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No. 05-

IN THE
Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY;
LORILLARD TOBACCO COMPANY;
R.J. REYNOLDS SMOKE SHOP, INC.,

Petitioners,

v.

SANDRA SHEWRY, DIRECTORY OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DILEEP G. BAL, ACTING CHIEF OF THE TOBACCO CONTROL SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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January 6, 2006

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QUESTION PRESENTED

Whether the First Amendment prohibits government from levying a tax that applies solely to a discrete disfavored group and using the dedicated revenues from the tax to fund government speech attacking the very same group that is subject to the tax.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings in the Ninth Circuit were Petitioners R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, R.J. Reynolds Smoke Shop, Inc., Sandra Shewry, Director of the California Department of Health Services, Dileep G. Bal, Acting Chief of the Tobacco Central Section of the California Department of Health Services and the State of California. Diana M. Bonta appeared as the Director of the California Department of Health Services in the district court. Otherwise, no other party appeared in any proceeding below. Pursuant to Supreme Court Rule 29.6, the following list names all parent companies and subsidiaries (except wholly owned subsidiaries) of each petitioner:

Petitioner R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., formerly known as RJR Nabisco, Inc. On December 11, 2000, R.J. Reynolds Tobacco Holdings, Inc. acquired Nabisco Group Holdings Corp, now a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., renamed RJR Acquisition Corp. Since June 15, 1999, R.J. Reynolds Tobacco Holdings, Inc. has been a publicly owned corporation. Before then, RJR Nabisco, Inc. was a wholly owned subsidiary of RJR Nabisco Holdings Corp., a publicly owned corporation. RJR Nabisco Holdings Corp. is now Nabisco Group Holdings Corp., and since June 14, 1999, has not held a direct or indirect ownership interest in R.J. Reynolds Tobacco Holdings, Inc. or R.J. Reynolds Tobacco Company. R.J. Reynolds Tobacco Holdings, Inc. is now a wholly-owned subsidiary of Reynolds American Inc. Brown & Williamson Holdings, Inc. owns approximately 42% of Reynolds American Inc. and is an indirect wholly-owned subsidiary of British American Tobacco, p.l.c.

Petitioner R.J. Reynolds Smoke Shop Inc. is a wholly owned subsidiary of Petitioner R.J. Reynolds Tobacco Company.

Lorillard Tobacco Company is wholly owned by Lorillard, Inc., which is wholly owned by Loews Corporation. There is no other publicly held corporation that owns 10% or more of this Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit. The panel majority held that a state may tax an unpopular business and use the dedicated proceeds of that tax in a public campaign designed to destroy that business. Certiorari should be granted to resolve an important First Amendment question as to whether the use of a targeted tax to fund government speech against the taxpayer is an unconstitutional form of compelled speech.

OPINIONS BELOW

The amended opinion of the court of appeals, App., *infra*, 1a-47a, is reported at 423 F.3d 906. The original opinion of the court of appeals, App., *infra*, 48a, is reported at 384 F.3d 1126. The order of the district court, App., *infra*, 49a-99a, is reported at 272 F. Supp. 3d 1089.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2004. Rehearing en banc was denied, and the panel's opinion amended, on September 9, 2005. App., *infra*, 1a. On November 28, 2005, Justice O'Connor granted an application for an extension of time to file a petition for certiorari to and including Jan. 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

The relevant provisions of the California Tobacco Tax and Health Promotion Act of 1988, Cal. Rev. & Tax.

Code §§ 30121-30130 are reproduced in the Appendix, App., *infra*, 100a-103a.

STATEMENT OF THE CASE

This case presents an important question at the intersection of the First Amendment doctrines of "government speech" and "compelled speech": May the government, consistent with the First Amendment, tax an unpopular business and use the dedicated proceeds of the tax to fund a public campaign vilifying that business, partly through associating it with unwanted messages?

Pursuant to California's "Proposition 99," Petitioners pay a tax to the State of 25 cents per pack of cigarettes they distribute to consumers in California. The proceeds of the tax are used, in part, to fund an anti-smoking media campaign. The campaign includes some conventional advertisements focused on the health risks of smoking, but spends nearly twice as much on advertisements that demonize the tobacco industry and tobacco company executives. California has described these ads as "anti-industry" and "propaganda," and its Attorney General candidly "agreed that the ad campaign aimed to put [Petitioners] out of business." App. *infra*, 32a. Petitioners challenged the State's imposition of a targeted tax to fund ads attacking the taxpayers.

The Ninth Circuit held that California's "tax-and-smear" campaign could not violate the First Amendment because it constituted "government speech." The Ninth Circuit's holding did not allow for any First Amendment limits on "government speech," contrary to this Court's decision in *Johanns* v. *Livestock Marketing Association*, 125 S. Ct. 2055 (2005), and decisions of other courts.

1. California's "Proposition 99." By ballot initiative, California's voters approved the "Tobacco Tax and Health Promotion Act of 1988," also known as "Proposition 99." App., *infra*, 50a-51a; Cal. Rev. & Tax. Code §§ 30121-30130. The Act imposes a 25-cent per pack

"surtax" on cigarette sales by distributors of tobacco products in California. Cal. Rev. & Tax. Code § 30123. Petitioners are manufacturers rather than distributors, but they are required to pay the surtax because they also provide cigarettes directly to consumers. *See* App., *infra*, 6a.

The proceeds of the surtax are deposited in the "Cigarette and Tobacco Products Surtax Fund." *Id.*, § 30122(a). Tax revenues deposited in the Fund may be used for four purposes, the first of which is "tobacco-related school and community health education programs."[1] *Id.* Twenty percent of the taxes collected are allocated to the "Health Education Account," which may be used only "for programs for the prevention and reduction of tobacco use, primarily among children, through school and community health education programs." *Id.* §§ 30122(b)(1), 30124(b). An additional twenty-five percent of the tax proceeds are placed in an "Unallocated Account," which may be used for tobacco-related programs or any of the other purposes for which tax revenues deposited in the Surtax Fund may be used.[2] *Id.* §§ 30122(b), 30124(b).

To implement Proposition 99, the California legislature in 1989 directed the California Department of Health Services to establish "a program on tobacco use and health to reduce tobacco use in California by conducting health education interventions and behavior

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[1] The other purposes are tobacco-related disease research, medical care for uninsured patients who cannot afford to pay, and programs for fire prevention, environmental conservation, and wildlife habitats. Cal. Rev. & Tax. Code § 30122(a).

[2] The remainder of the surtax fund is apportioned among the Hospital Services Account (35%), the Physician Services Account (10%), the Research Account (5%), and the Public Resources Account (5%). Cal. Rev. & Tax. Code § 30124(b).

change programs at the state level, in the community, and other nonschool settings." Cal. Health & Safety Code § 104375(a). Under the program, known as the Tobacco Control Program, the Department is required to "develop a media campaign directed to raising public awareness of the deleterious effects of smoking and to effect a reduction in tobacco use." App., *infra*, 53a. The Tobacco Control Program is funded entirely from the Health Education Account, which in turn is funded exclusively from the proceeds of the surtax. *Id.* at 3a. Approximately two-thirds of the surtax proceeds allocated to the Health Education Account are used by California's Department of Health Services for its tobacco control activities. App., *infra*, 53a.

2. The Department of Health Services' Anti-Industry Advertisements. Soon after initiating the Tobacco Control Program in 1989, the Department of Health Services determined that a media campaign focused solely on education about the health risks of smoking would have only limited success in reducing smoking. App., *infra*, 3a. The Department decided that it would adopt a different approach, which was "to portray the tobacco industry itself as deceptive and as an enemy of the public health." *Id.* at 4a. To implement this approach, the Department launched a series of television commercials.

The district court described some of the Department's anti-industry advertisements:

> A recent round of television commercials features an actor playing a public relations executive for the fictional cigarette brand "Hampton," detailing for viewers his unseemly methods for getting people to start smoking. The ads end with the tagline, "Do You Smell Smoke?," implicitly referencing both cigarette smoke and a smoke-and-mirrors marketing strategy.

> Another ad portrays tobacco executives discussing how to replace a customer base that is dying at the rate of 1,100 users a day. Some of the ads end with images of mock warning labels such as: "WARNING: The tobacco industry is not your friend."; or "WARNING: Some people will say anything to sell cigarettes."

App., *infra*, 53a-54a.

In a commercial that the district court described as "particularly striking," children are shown playing in a schoolyard, looking up while cigarettes rain down on them from the sky. The voiceover is phrased as if a tobacco industry representative were speaking:

> We have to sell cigarettes to your kids. We need half a million new smokers a year just to stay in business. So we advertise near schools, at candy counters, we lower our prices. We have to. It's nothing personal. You understand.

Id. at 54a. At the conclusion, a narrator says, "The tobacco industry: how low will they go to make a profit?" *Id.*

Another commercial features actors portraying arrogant tobacco industry executives testifying insincerely in regulatory hearings and press interviews. Although these scenes are fictitious, the commercial creates the impression that the replayed footage was taken from official tapes of congressional proceedings or press briefings. (ER 7, ¶19; ER 592 at File 06JDR13.MPG).

The State of California spends approximately $25 million annually on these advertisements. App., *infra*, 53a.

3. The District Court Decision. Petitioners brought suit, alleging that California's scheme to attack tobacco companies by using the proceeds of the surtax to fund anti-industry advertisements violated their right to be free from compelled speech under the First Amendment.[3] The parties filed cross motions in the district court. Petitioners moved for a preliminary injunction, while Respondents moved to dismiss the case for lack of standing and failure to state a claim. The court held that Petitioners had standing to pursue their claims, App., *infra*, 57a-62a, but granted Respondents' motion to dismiss. *Id.* at 98a.

The court held that the anti-industry advertisements were not compelled speech. Instead, it held that the ads constituted "government speech" because they are attributed to the California Department of Health Services, and because government officials had "actual responsibility" for the ads. *Id.* at 76a-77a. The court regarded "compelled speech" and "government speech" as mutually-exclusive categories. *Id.* at 74a-77a.

The trial court stated that the "government speech doctrine teaches that the remedy for [Petitioner's] assertion of harm is 'political rather than judicial,'" but it observed that "the path taken by Proposition 99 turns the democratic process on its head. Rather than citizens trying to persuade the government as to a proper course of its conduct, the government tries to dissuade the public from engaging in conduct it apparently does not have the political will to either regulate or ban." *Id.* at 80a & n.21.

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[3] Petitioners asserted additional claims that are not before this Court, including: (1) a compelled speech claim under the California Constitution; (2) a claim that the ads violate Petitioners' Due Process and Jury Trial rights under the Seventh and Fourteenth Amendments; and (3) a claim that the ads violate the Seventh Amendment. App. *infra*, 56a-57a.

The court nevertheless concluded that "California's decision to combat the problem [of tobacco] through a strategy of education and counter-advertising, as opposed to outright prohibition, is, under present doctrine, a political and practical judgment that the state is free to make." *Id.* at 85a-87a.

4. The Ninth Circuit's Decision. The Ninth Circuit affirmed in a split decision. The court recognized the government's obligation not to compel taxpayers to fund private speech with which they disagree, but found that where "the government acts as both a taxing authority and as a speaker," "it may espouse views that directly contradict those of taxpayers without interfering with taxpayers' freedom of expression," even if the speech vilifies the very taxpayers who are the target of the excise tax that funds the speech. App., *infra*, 14a-15a.

The panel majority held that "[a] mere link between an excise tax and a government-sponsored advertising campaign, absent a claim that either the tax or the advertising is unconstitutional, does not violate the First Amendment." App., *infra*, 8a. Thus, under the Ninth Circuit's reasoning, so long as the government enacts a permissible tax and uses it to engage in permissible speech, no First Amendment claim arises.

Judge Trott dissented, characterizing California's tax-and-smear scheme as "an exceptional case of government intrusion on the right not to be compelled to finance speech." *Id.* at 43a. Judge Trott stated that the statute was "designed to force one particularly disfavored group to fund speech directly undermining that group's reputation," which "offends the very essence of the First Amendment." *Id.*

Petitioners sought rehearing en banc. The Ninth Circuit stayed the petition pending this Court's decision in *Johanns* v. *Livestock Marketing Association*, 125 S. Ct.

2055 (2005). After *Johanns* was decided, the Ninth Circuit denied the petition for rehearing, and the panel majority and the dissenting judge each amended their opinions to address *Johanns*. App., *infra*, 29a-30a (postscript to majority opinion); 44a-47a (postscript to dissent).

REASONS FOR GRANTING THE WRIT

I. This Case Warrants Further Review In Light Of *Johanns*.

This Court addressed the "government speech" doctrine last Term in *Johanns* v. *Livestock Marketing Association*, 125 S. Ct. 2055 (2005). In *Johanns*, cattle ranchers challenged a "checkoff" program that imposed a $1-per-head assessment and used some of the proceeds to fund promotional advertisements supporting the beef industry. The Court held that the pro-industry advertisements were the government's own speech, and thus did not violate the First Amendment. Although both *Johanns* and this case involve the government speech doctrine, *Johanns* does not control, and indeed it indicates that this case warrants further review. That is so for three reasons.

First, *Johanns* presented a facial challenge to a checkoff program that funded generic advertising favoring those who were subject to the checkoff. The primary question was whether the advertising was "government speech" at all. This case, in contrast, presents an as-applied challenge to the use of a tax on a disfavored group to fund an ad campaign directly attacking that group. *Second*, the advertisements funded by the surtax "tar" petitioners "with the content" of the ads and "'coercively associate' and intentionally smear the appellants—all of them—with an 'unwanted message.'" App., *infra*, 46a. *Third*, unlike the program in *Johanns*, California's tax-and-smear campaign is not subject to adequate political safeguards.

A. *Johanns* Resolved A Different Question.

The primary question in *Johanns* was whether the beef checkoff program constituted "government speech." The beef producers challenging the checkoff argued that the beef campaign was not "government speech" because the content of the campaign was controlled by a nongovernment committee. *Johanns*, 125 S. Ct. at 2062. The Court rejected this argument, holding that the message "is effectively controlled by the Federal Government itself." *Id.* The argument "that the beef program does not qualify as 'government speech' because it is funded by a targeted assessment" was also rejected. *Id.* at 2063. Thus, for purposes of a "compelled-subsidy" case, it does not matter "whether the funds for the promotions are raised by general taxes or through a targeted assessment." *Id.*

This case is different. Petitioners do not deny that the State controls the content of the advertising campaign. Nor do they assert that the source of funding makes the ad campaign any less the government's speech. Instead, Petitioners challenge the scope of the "government speech" doctrine. Petitioners ask the Court to determine whether the doctrine gives the State carte blanche to fund advertising campaigns directed against unpopular minority groups with taxes imposed exclusively on those very groups.

As Judge Trott's dissent stated:

> Today the target of government dislike is smoking, but tomorrow it will be something else, such as Alabama's imposition, in its the Woman's Right to Know Act, of a fee applied to abortion providers for the production by the state of pro-childbirth materials which the providers did not wish to endorse, much less purchase. *See* Ala.

> Code §§ 26-23A-1 to 13; *Summit Medical Center of Alabama, Inc.* v. *Riley*, 284 F. Supp. 2d 1350 (M.D. Alabama 2003). Who knows whose disfavored ox or whose industry or business or lifestyle will be the next to be fatally gored in this manner by a well-intentioned government.

App., *infra*, 32a.

Moreover, *Johanns* decided a facial challenge to the beef checkoff program, focusing on whether entities that pay a targeted assessment have a "right not to fund government speech." 125 S. Ct. at 2064, n.7. Here, Petitioners challenge the California surtax only as applied to the State's decision to use the proceeds of the surtax for anti-industry advertisements.

B. The Advertisements Impermissibly Associate Petitioners With Their Content.

In *Johanns*, the Court recognized that an as-applied challenge to the beef checkoff program might lie if "individual beef advertisements were attributed to" the beef producers. 125 S. Ct. at 2065. The Court stated that there was insufficient evidence in the record to determine whether any beef producers would be "tarred with the content" of the challenged ads. *Id.* at 2065-66. In a concurrence, Justice Thomas agreed that "respondents would have a valid as-applied First Amendment challenge" if the advertisements "associated" their message "with either the individual or organization respondents." *Id.* at 2066 (Thomas, J., concurring). The concurrence goes on to state: "The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them." *Id.* The State did exactly that here.

California's ads attribute an unwanted message to tobacco companies even though they do not state that the companies are paying the bill. They do so essentially by putting "words in the mouth" of tobacco companies and company executives. The State hired actors to play tobacco company executives and sales personnel. The ads show tobacco executives lying to Congress. They show executives sitting around a conference table discussing how to encourage smoking and mocking health concerns. The ads use voiceovers that are presented as statements by the industry, such as "We have to sell cigarettes to your kids." It is not surprising that the State candidly describes its ads as "propaganda," since one of the classic techniques of propaganda is to ascribe distasteful views or alleged quotations to one's opponent, to cause the public to associate the opponent with the negative message. The First Amendment prevents the government from requiring the target of such a propaganda campaign – here, domestic companies engaged in a lawful business – to fund the campaign.[4]

Judge Trott's postscript to his dissent following the *Johanns* decision correctly concludes that this case presents exactly the "tarring" and "coercive association" contemplated by the majority and concurring opinions in *Johanns*. App., *infra*, 46a. As Judge Trott stated, if the challenged advertisements do not "'tar all in the industry' required to pay for the ad, and if this language does not 'coercively associate' and intentionally smear the

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[4] The panel majority dismissed one "particularly striking" ad that puts words directly into the mouths of tobacco company executives on the ground that "[n]o reasonable viewer could overlook the satirical tenor of this ad." App., *infra*, 30a. At the very least, as Judge Trott correctly noted, these facts "should be submitted–as suggested by the Supreme Court–to a factfinder," App., *infra*, 46a.

[Petitioners]—all of them—with an 'unwanted message' to which they object, it is hard to know what does." *Id.*

C. The Advertisements Are Not Subject To Effective Political Safeguards

In *Johanns*, the Court was careful to state that the targeted nature of a tax to fund government speech does not establish a First Amendment claim where there are political safeguards that are "more than adequate to set them apart from private messages." 125 S. Ct. at 2064. Although the dissent argued that the checkoff program was not subject to sufficient political accountability, it agreed that "if government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable." *Id.* at 2069 (Souter, J., dissenting). The dissent stated that "[t]he adequacy of the democratic process to render the subsidization of government speech tolerable is, naturally, tied to the character of the subsidy." *Id.* at 2071. When an assessment is targeted, the "First Amendment affront [is] more galling," and "greater care is required." *Id.* at 2071-72. In addition, "the intensity of the provocation experienced by the targeted group" justifies greater scrutiny. *Id.* at 2072.

The beef checkoff program was "subject to a referendum among beef producers," that was passed by "a large majority." *Id.* at 2059. Moreover, the Secretary of Agriculture could call for another referendum upon demand of a "'representative group' comprising 10 percent of cattle producers." *Id.* at 2064 n.6. Thus, the cattle producers who were the "target" of the checkoff program collectively approved the program, which generally funded speech that was favorable to the producers.[5]

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[5] The objectors to the beef checkoff in *Johanns* disagreed with the generic pro-beef messages because they believed that (...continued)

The same is not true here. Petitioners had no opportunity to approve the surtax or the advertisements funded by the tax. Moreover, the advertisements are not, as was the case in *Johanns*, generic messages that generally favor Petitioners. Indeed, the expressly stated purpose of the ads is to destroy the industry by making it and its product even more unpopular than they might otherwise be.[6] As a result, these ads are a particularly "intens[e]" form of "provocation" and thus a "more galling" affront to the First Amendment. *Id.* at 2071-72.

Unlike *Johanns*, the government here has avoided political safeguards by targeting a small and particularly disfavored minority with a message of condemnation. As the district court put it, "the path taken by Proposition 99 turns the democratic process on its head. Rather than citizens trying to persuade the government as to a proper course of its conduct, the government tries to dissuade the public from engaging in conduct it apparently does not have the political will to either regulate or ban." App., *infra*, 80a & n.21.

II. The First Amendment Limits Government Power To Tax A Disfavored Minority Group For The Purpose Of Funding Government Speech Attacking The Very Group That Is Subject To The Tax.

The Court has "sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true 'compelled speech' cases, in

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certain forms of beef are superior. 125 S. Ct. at 2068 (Souter, J., dissenting).

[6] This is so even though the state concededly adopted this strategy because it believed consumers were already aware of the health risks of smoking, so health information messages were not useful.

which an individual is obliged personally to express a message he disagrees with, imposed by the government; and 'compelled subsidy' cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity." *Johanns*, 125 S. Ct. at 2060. Before *Johanns*, the Court had not "considered the First Amendment consequences of government-compelled subsidy of the government's own speech." *Id.* While *Johanns* rejected such a claim, as explained above, the Court's decision in *Johanns* does not control this case. Most fundamentally, in this case the "purpose of the coerced speech is deliberately destructive of those forced to pay for it—not so in *Johanns*." App., *infra*, 47a (Trott, J. dissenting). Thus, under the compelled speech doctrine, a State should be found to violate the First Amendment when it imposes a targeted tax to fund government speech directed against the targets of the tax.

The panel majority's contrary decision mistakenly concludes that, so long as neither the challenged advertisements nor the tax itself violate the First Amendment when viewed in isolation, the combination of the tax and the advertisements must also be constitutional.[7] The Ninth Circuit began its discussion of the First Amendment issues in this case by quoting Chief Justice Marshall's famous statement for the Court in

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[7] This Court rejected a similar argument under the Commerce Clause in *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994). There, the State of Massachusetts imposed a tax on milk sold in Massachusetts and used the revenues from the tax to subsidize in-state milk producers. The State argued that the tax was constitutional when viewed in isolation, and the subsidy was also constitutional when viewed in isolation, and therefore the combination of the tax and subsidy must also be constitutional. This Court disagreed, and looked instead to the combined effect of both government measures.

McCulloch v. *Maryland*, that "the power to tax involves the power to destroy." App., *infra*, 7a, (quoting 17 U.S. (4 Wheat) 316, 431 (1819)). The tax at issue here involves an especially pernicious use of the power to tax. Where a State taxes a disfavored small group in order to fund an advertising campaign attacking that very group, it strikes two blows at once. The State not only compels a disfavored group to devote resources to speech attacking itself, but it deprives the disfavored group of those same resources to advance the group's own message.

Immediately after quoting Chief Justice Marshall, the Ninth Circuit stated that "this case involves neither an invalid exercise of the government's power to tax nor a claim that they have been destroyed by the government's speech." *Id.* But the First Amendment is not so limited. As Judge Trott observed, where the government forces a taxpayer to fund a campaign for its own destruction, it "offends the very essence of the First Amendment." App., *infra*, 43a. Judge Trott cited Chief Judge Wilkinson's statement, in *Sons of Confederate Veterans* v. *Commissioner of the Virginia Department of Motor Vehicles*, that "[t]he First Amendment was not written for the vast majority. . . . It belongs to the minority of one." 305 F.3d 241, 242 (4th Cir. 2002) (Wilkinson, C.J., concurring in denial of rehearing en banc). California's program is thus "an exceptional case of government intrusion on the right not to be compelled to finance speech." *Id.* at 43a.

While minor disagreements over the content of speech coercively funded by targeted assessments are sufficient to trigger constitutional scrutiny, *e.g.*, *United States* v. *United Foods*, 533 U.S. 405, 411 (2001), "the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect." *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991). Here, the extent of disagreement is truly

extraordinary, and therefore the degree of impingement upon free expression is very large.

In addition, the impact of speech is increased when the government places its imprimatur on the message presented to the public, *See Miller* v. *California Comm'n on the Status of Women*, 151 Cal. App. 3d 693, 702 (1984) ("That the imprimatur of government has conferred an advantage upon the commissioners is undeniable"). Where, as here, the State combines its powerful voice with its coercive power to tax, it distorts the marketplace of ideas.

III. The Ninth Circuit's Decision Conflicts With Decisions Of Other Courts Recognizing First Amendment Limits On Government Speech.

Petitioners claim that the nexus between the targeted tax and California's program vilifying the taxpayers burdens the taxpayers' ability to express their views. The Ninth Circuit categorically rejected this claim, holding that a government program cannot constitute a "restriction on [parties'] ability to express their views" unless it engages in either unconstitutional taxation or unconstitutional speech. App., *infra*, 24a.

The Ninth Circuit's decision conflicts with decisions of two other circuits recognizing additional First Amendment limitations on government speech. In *Warner Cable Communications* v. *City of Niceville*, a cable company challenged a city government's decision to implement a city-owned cable system. 911 F.2d 634 (11th Cir. 1990). The Eleventh Circuit noted that the government may participate in the marketplace of ideas without offending the First Amendment, but recognized that in some cases of government speech, "First Amendment concerns would arise." In particular, the court recognized that there is a concern where "government speech becom[es] so dominant as to 'drown out' the voice of private speakers." *Id.* at 638. The court

stated that "the government may not speak so loudly as to make it impossible for other speakers to be heard by their audience." *Id.*

The court continued:

> For instance, if a city government builds a better soapbox, equipped with spotlights and powerful loudspeakers, next to the longstanding antique soapbox in the city square, and if government speakers dominate the new soapbox, then speakers on the first soapbox do not truly have the opportunity to communicate their views even to those who might wish to hear them. The city would indeed be 'drowning out' the voice of the private speakers.

Id. at 638. The court went on to decide that the facts of the case did not justify the cable company's concern that its speech would be drowned out by the government-operated cable system. *Id.*

The Sixth Circuit has similarly held that "the government may not engage in speech suppression through its own speech." *AMSAT Cable* v. *Cablevision Ltd. P'ship*, 6 F.3d 867, 872 (2d Cir. 1993). In *AMSAT*, the court held that a satellite television provider's freedom of speech is not abridged by an ordinance requiring it to give access to competing cable providers to apartment complexes exclusively serviced by the satellite company. *Id.* at 871-872. The court cited with approval the *Warner Cable* decision that "'the government may not speak so loudly as to make it impossible for other speakers to be heard by their audience,'" but ultimately held that "[n]o such suppression [had] occurred." *Id.* at 872 (quoting *Warner Cable*, 911 F.2d at 638).

The Ninth Circuit's opinion places no First Amendment limits on the power of government to impose a targeted tax on an unpopular minority to fund speech

directed against that minority. The court stated: "In short, by being required to contribute to DHS's advertisements, the tobacco companies have not been deprived of their freedom of expression." App., *infra*, 20a. The Ninth Circuit's decision does not recognize that such a targeted tax may compromise the taxpayer's ability to advance its own message. To the contrary, the decision flatly denies the possibility, stating that Petitioners' challenge does not constitute a "restriction on their ability to express their views." *Id.* at 24a.

In fact, the Ninth Circuit's opinion allows governments to diminish or drown out the speech of an unpopular minority at will, simply by taxing away some or all of the resources of the unpopular minority, and using those resources to fund government speech that is antithetical to the views of the minority. Because the Ninth Circuit's decision holds that there is no limit to government's ability to engage in such maneuvers, so long as the targeted tax and the targeted government speech are constitutionally valid when considered in isolation, its decision conflicts with the decisions of the Eleventh Circuit in *Warner Cable* and the Sixth Circuit in *AMSAT*.

The Ninth Circuit acknowledged the Eleventh Circuit's decision, but dismissed it as inapplicable to this case. App., *infra*, 24a-25a. According to the Ninth Circuit, *Warner Cable* is inapposite because Petitioners "do not argue that the government's speech itself is constitutionally impermissible; nor do they argue that the government has burdened their First Amendment rights through the exercise of its power to tax." App., *infra*, 24a. The court continued: "Were the tobacco companies challenging a California restriction on their ability to express their views, our analysis would be different." *Id.*

The Ninth Circuit dismissal of *Warner Cable* is unjustified. Under *Warner Cable*, California's tax-and-advertise scheme would be impermissible because it allows government to "drown out" private speech by

funding government speech attacking an unpopular industry with revenues extracted from that very industry. And contrary to *AMSAT*, the Ninth Circuit's decision allows the government to "engage in speech suppression through its own speech." 6 F.3d at 872.

The Ninth Circuit's decision also ignores the significant limitations on Petitioners' ability to respond to California's negative advertisements. Although Petitioners have significant resources, they are subject to extensive restrictions on their advertising activities, through federal and state laws and the Master Settlement Agreement with the National Association of Attorneys General. *See, e.g., Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 541 (2001) ("Congress has crafted a comprehensive federal scheme governing the advertising and promotion of cigarettes."); 15 U.S.C. § 1335 ("After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."); Tobacco Master Settlement Agreement, available at http://www.naag.org/backpages/naag/tobacco/msa (visited Dec. 29, 2005). Moreover, any attempt by Petitioners to counter the State's advertising would very likely subject the companies to potential lawsuits under California law based on that very attempt. *See Kasky* v. *Nike*, 45 P.3d 243, 261 (Cal. 2002) (holding that Nike's public rebuttal statements about working conditions in its factories are commercial speech). This Court granted certiorari in *Kasky*, and although the writ was later dismissed, three Justices dissented from that decision based in part on the "chilling effect" of the relevant California law. Given these restrictions, California's imposition of a tax to fund

television ads maligning the taxpayers is particularly destructive of First Amendment values.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] The Ninth Circuit's decision also conflicts with the decision in *Summit Medical Center of Alabama, Inc.* v. *Riley*, 284 F. Supp. 2d 1350 (M.D. Ala. 2003). *Summit* involved a challenge by an abortion provider to a state law requiring abortion providers to purchase and distribute pamphlets published by the State that expressed a view of abortion objectionable to the provider. The *Summit* court initially found that the providers could not be required to pay for these pamphlets, even though the State could require the providers to distribute them. *Summit Med. Ctr. of Ala., Inc.* v. *Riley*, 274 F. Supp. 2d 1262, 1277 (M.D. Ala. 2003).

In its initial decision, the court did not mention that the pamphlets were published by the State, and were therefore "government speech." Following the district court's decision in this case, the *Summit* court expressly considered the government speech doctrine and reaffirmed its ruling. The court held that "the government speech doctrine cannot serve as a shield against all First Amendment challenges." 284 F. Supp. 2d at 1359. The court held that "the State's interest in requiring abortion providers to pay for its informational materials cannot justify the significant infringement on the Plaintiffs' First Amendment rights." *Id.* at 1362.

Respectfully submitted,

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January 6, 2006

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No. 05-

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY; LORILLARD TOBACCO COMPANY; R.J. REYNOLDS SMOKE SHOP, INC.,

Petitioners,

v.

SANDRA SHEWRY, DIRECTORY OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; DILEEP G. BAL, ACTING CHIEF OF THE TOBACCO CONTROL SECTION OF THE CALIFORNIA DEPARTMENT OF HEALTH SERVICES; STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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January 6, 2006

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No. 03-16535

R.J. REYNOLDS TOBACCO COMPANY; LORILLARD TOBACCO COMPANY; R. J. REYNOLDS SMOKE SHOP, INC., *Plaintiffs-Appellants*,

v.

SANDRA SHEWRY, Director of the California Department of Health Services; DILEEP G. BAL, Acting Chief of the Tobacco Control Section of the California Department of Health Services; STATE OF CALIFORNIA, *Defendants-Appellees*.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

May 10, 2004, Argued and Submitted,
San Francisco, California

September 9, 2005, Amended

Before: Betty Binns Fletcher, Stephen Trott and Raymond C. Fisher, Circuit Judges.

FISHER, Circuit Judge:

We deal here with a novel First Amendment claim. The appellants, three tobacco companies, claim that California violated their First Amendment rights by imposing a surtax on cigarettes and then using some of the proceeds of that surtax to pay for advertisements that criticize the tobacco industry. The tobacco companies argue that this is a case of compelled subsidization of speech prohibited by the First Amendment, analogous to *United States* v. *United Foods, Inc.*, 533 U.S. 405, 150 L.

Ed. 2d 438, 121 S. Ct. 2334 (2001). California counters that the advertisements are government speech entirely immune from First Amendment attack.

The tobacco companies concede that (1) the imposition of the tax itself is not unconstitutional and (2) the message produced by the government's advertisements creates no First Amendment problem apart from its method of funding. Rather, they argue for an independent First Amendment violation based on the close nexus between the government advertising and the excise tax that funds it. We reject this argument as unsupported by the Constitution and Supreme Court precedent, and as so unlimited in principle as to threaten a wide range of legitimate government activity. We also reject the tobacco companies' claim that the advertisements violated their rights under the Seventh Amendment or the Due Process Clause. We thus affirm the district court.[1]

FACTUAL AND PROCEDURAL BACKGROUND[2]

In 1988, California voters approved Proposition 99, a statewide ballot initiative also known as the "Tobacco Tax and Health Protection Act of 1988." Cal. Rev. & Tax Code §§ 30121-30130. The Act imposes the Cigarette and Tobacco Products Surtax ("the surtax"), a 25-cent per-pack surtax on all wholesale cigarette sales in California.

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[1] We note that the district court issued a particularly thoughtful, thorough and comprehensive opinion in this case, upon which we have substantially relied even though we do not adopt all of its reasoning.

[2] Because this case comes before us on the state's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we accept as true all allegations in the tobacco companies' complaint.

The revenue generated by the surtax is placed in the "Cigarette and Tobacco Products Surtax Fund." Twenty percent of taxes in the surtax fund is allocated to a "Health Education Account," funds from which are only "available for appropriation for programs for the prevention and reduction of tobacco use, primarily among children, through school and community health education programs." *Id.*, § 30122(b)(1).

In order to implement Proposition 99, the California Legislature directed the California Department of Health Services ("DHS") to establish "a program on tobacco use and health to reduce tobacco use in California by conducting health education interventions and behavior change programs at the state level, in the community, and other nonschool settings." Cal. Health & Safety Code § 104375(a). As part of this program, called the "Tobacco Control Program," the DHS is required to develop a media campaign designed to raise public awareness of the deleterious effects of smoking and to effect a reduction in tobacco use. *Id.*, §§ 104375(b), (c), (e)(1) & (j); 104385(a); 104400. The Tobacco Control Program is funded entirely with money from the Health Education Account—and thus, ultimately, exclusively from the proceeds of the surtax.

This case concerns certain advertisements the DHS produced as part of its Tobacco Control Program. According to the tobacco companies, the DHS concluded soon after the establishment of the Tobacco Control Program that a media campaign focused solely on presenting the health risks of tobacco use would be of limited utility in reducing the incidence of smoking in California, because people tend to "tune out" advertising that simply explains the health risks involved with tobacco use. Thus, the DHS concluded that, in order to carry out its mandate to encourage Californians to modify and reduce their use of tobacco, it would be necessary to launch a campaign to "denormalize" smoking, by creating

a climate in which smoking would seem less desirable and less socially acceptable.

One method used by the DHS in this campaign has been to portray the tobacco industry itself as deceptive and as an enemy of the public health, or, in the companies' words, to attack not "the desirability of a product but . . . the moral character of [the] industry, accusing it of hypocrisy, cynicism and duplicity." The district court described these advertisements as follows:

> A recent round of television commercials features an actor playing a public relations executive for the fictional cigarette brand "Hampton," detailing for viewers his unseemly methods for getting people to start smoking. The ads end with the tagline, "Do You Smell Smoke?," implicitly referencing both cigarette smoke and a smoke-and-mirrors marketing strategy. Another ad portrays tobacco executives discussing how to replace a customer base that is dying at the rate of 1,100 users a day. Some of the ads end with images of mock warning labels such as: "WARNING: The tobacco industry is not your friend."; or "WARNING: Some people will say anything to sell cigarettes." Several spots suggest that tobacco companies aggressively market to children. In one particularly striking television ad entitled "Rain," children in a schoolyard are shown looking up while cigarettes rain down on them from the sky. A voice-over states "We have to sell cigarettes to your kids. We need half a million new smokers a year just to stay in business. So we advertise near schools, at candy counters. We lower our prices. We have to. It's nothing personal. You

> understand." At the conclusion, the narrator says, "The tobacco industry: how low will they go to make a profit?"

R.J. Reynolds v. *Bonta*, 272 F. Supp. 2d 1085, 1089 (2003). The district court also noted that each of the challenged advertisements is "identified as 'Sponsored by the California Department of Health Services.' " *Id.* The tobacco companies do not claim that these advertisements contain any affirmatively false statements.

That California itself is interested in the outcome of the campaign is made clear by the Legislature's finding that "smoking is the single most important source of preventable disease and premature death in California" and that preventing tobacco use by children and young adults is the "highest priority in disease prevention for the state of California." Cal. Health & Safety Code § 104350(a). The district court explained that "there is substantial evidence, including published medical studies, indicating that the Proposition 99 programs, and the media campaign in particular, have been successful in achieving their goals." *Bonta*, 272 F. Supp. 2d at 1088 n.5 (noting the following articles describing the success of California's campaign in reducing the incidence of smoking: C. Fichtenberg and S. Glantz, *Association of the California Tobacco Control Program with Declines in Cigarette Consumption and Mortality from Heart Disease*, NEW ENG. J. MED. 343:24, 1772-1777 (2000); M. Siegel, *Mass Media Antismoking Campaigns: A Powerful Tool for Health Promotion*, ANNALS OF INTERNAL MED., 129:2, 128-132 (1998); J.P. Pierce, et al., *Has the California Tobacco Control Program Reduced Smoking?*, JAMA 280:10, 893-899 (1998)).

The appellant tobacco companies here are R.J. Reynolds Tobacco Company; its wholly owned subsidiary R.J. Reynolds Smoke Shop, Inc.; and Lorillard Tobacco Company. R.J. Reynolds pays the surtax through sales from its smoke shop subsidiary; Lorillard pays the surtax

in connection with certain of its research and marketing activities in California. These companies are not the most important sources of revenue for the surtax, however. Because the surtax is imposed on distributors of cigarettes, most surtax payments are made not by cigarette manufacturers themselves, but by cigarette wholesalers. Nonetheless, because the tobacco companies sell or provide small quantities of cigarettes directly to smokers in California, they have paid and will in the future be required to pay the surtax. The tobacco companies here paid approximately $ 14,000 in surtax funds, thus contributing approximately $ 2,800 of the $ 25 million spent on the challenged ads. *Bonta*, 272 F. Supp. 2d at 1090.

The tobacco companies brought five causes of action against the state defendants ("the state" or "California") to the district court, seeking both injunctive and declaratory relief. They argued that the use of the surtax to fund the "anti-industry" advertisements violated the First Amendment, that the advertisements improperly stigmatized them in violation of the Fourteenth Amendment, that the advertisements interfered with their right to a jury trial under the Seventh and Fourteenth Amendments and that the advertisements violated the California Constitution.[3] The state moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court dismissed with prejudice all of the companies' federal constitutional claims, and the companies timely appealed.

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[3] This state law claim is not before us.

DISCUSSION

I. First Amendment

We begin by addressing the scope of the First Amendment issue. The tobacco companies do not raise a First Amendment challenge to California's right to sponsor "anti-industry" advertisements. As their brief to this court puts it, "if the broadcasts were funded by general taxes rather than by a tax imposed exclusively on the tobacco industry, the anti-industry ads would raise no First Amendment issue." Nor do the companies argue that the surtax itself has interfered with their constitutional rights. *See, e.g., Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 227-29, 95 L. Ed. 2d 209, 107 S. Ct. 1722 (1987) (invalidating a statute that granted a tax exemption for religious, professional, trade and sports journals that did not apply to other journals); *Minneapolis Star & Tribune* v. *Minn. Comm'r of Revenue*, 460 U.S. 575, 591-93, 75 L. Ed. 2d 295, 103 S. Ct. 1365 (1983) (invalidating a special tax on the press limited to only a few newspapers). Their claim is specific: they argue that using the money raised from an excise tax that targets the tobacco industry to pay for advertising that denigrates the industry violates their constitutional rights.

Before discussing the precedent upon which the tobacco companies rely, we note that this is a novel argument. At issue is neither the government's power to speak nor the government's power to tax. Chief Justice John Marshall famously stated that "the power to tax involves the power to destroy." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L. Ed. 579 (1819). According to the tobacco companies, however, this case involves neither an invalid exercise of the government's power to tax nor a claim that they have been destroyed by the government's speech. Rather, the companies claim a constitutional violation in the link between the excise tax and the government speech to which they object. By

suggesting that certain taxpayers should be able to object to government speech whenever an excise tax is used to fund a message that particularly affects the group that pays the tax, the tobacco companies' argument would implicate a range of other programs. As we shall explain, we reject the "nexus" argument as applied to excise taxation. A mere link between an excise tax and a government-sponsored advertising campaign, absent a claim that either the tax or the advertising is unconstitutional, does not violate the First Amendment.

A. *United Foods*, the Compelled Speech Doctrine and Taxation

The tobacco companies rely in large part upon one case: *United States* v. *United Foods, Inc.*, 533 U.S. 405, 150 L. Ed. 2d 438, 121 S. Ct. 2334 (2001).[4] We do not agree that *United Foods* controls. Rather, we conclude that the compelled speech cases, of which *United Foods* is one, do not apply where an excise tax is used to produce a message that indisputably comes from the government itself.

In *United Foods*, the Court considered a federal program created by the Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 6101 *et seq.* As the Court described the program,

> The Act authorizes the Secretary of Agriculture to establish a Mushroom

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[4] The Supreme Court has recently granted certiorari in *Livestock Mktg. Ass'n* v. *USDA*, 335 F.3d 711 (8th Cir. 2003), cert. granted sub nom. *Veneman* v. *Livestock Mktg. Ass'n*, 541 U.S. 1062, 158 L. Ed. 2d 962, 124 S. Ct. 2389, 72 U.S.L.W. 3725 (U.S. May 24, 2004) (No. 03-1164) and *Nebraska Cattlemen, Inc.* v. *Livestock Mktg. Ass'n*, 541 U.S. 1062, 158 L. Ed. 2d 962, 124 S. Ct. 2390, 72 U.S.L.W. 3725 (U.S. May 24, 2004), involving the interaction between the compelled speech and government speech doctrines.

> Council to pursue the statute's goals. Mushroom producers and importers, as defined by the statute, submit nominations from among their group to the Secretary, who then designates the Council membership. To fund its programs, the Act allows the Council to impose mandatory assessments upon handlers of fresh mushrooms in an amount not to exceed one cent per pound of mushrooms produced or imported. The assessments can be used for "projects of mushroom promotion, research, consumer information, and industry information." It is undisputed, though, that most moneys raised by the assessments are spent for generic advertising to promote mushroom sales.

533 U.S at 408 (citations omitted). The petitioner in that case was a mushroom producer that refused to pay its mandatory assessment. The Supreme Court described the question presented as "whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of persons, some of whom object to the idea being advanced." 533 U.S. at 410. Under the facts of *United Foods*, the Supreme Court held that the answer to that question was "no." The Court held that by requiring the mushroom producer to contribute to generic advertisements for mushroom sales to which it objected, the government had put "First Amendment values . . . at serious risk" by "compelling a discrete group of citizens [] to pay special subsidies for speech on the side that [the government] favors." *Id.* at 411.

Read broadly, and taken in isolation, this language might plausibly suggest that the tobacco companies have the right to object to the advertisements at issue here because they have paid "special subsidies" for the

advertisements in the form of a tax that disproportionately affects them. Yet *United Foods* also makes clear that not every case in which the government mandates support for speech from a particular group necessarily creates a First Amendment violation. Most importantly, the Court specifically declined to address whether the same First Amendment analysis would apply to cases in which the speech produced was "government speech" that derived from the state itself and not the Mushroom Council. *See id.* at 416 ("The Government argues the advertising here is government speech, and so immune from the scrutiny we would otherwise apply. As the government admits . . . however, this argument was not raised or addressed in the Court of Appeals.") (citations omitted). *United Foods* also carefully relied on the teaching of previous compelled speech cases to reach its holding about the contributions to the Mushroom Council. *Id.* In order to understand the impact of *United Foods*, therefore, we examine the origins and the purpose of the compelled speech doctrine.

It has long been established that the First Amendment prohibits the government from compelling citizens to express beliefs that they do not hold. "The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley* v. *Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977) (forbidding a state government from compelling motorists to display the message "Live Free or Die" on their license plates); *see also West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943) (preventing a state government from forcing children to salute the American flag when the children's religious beliefs forbade such behavior). These cases are not directly applicable here because there is no claim that the tobacco companies have been forced into expressing any position.

The Court extended this fundamental principle of freedom of expression to situations "involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." *United Foods*, 533 U.S. at 413. The first such case, *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977), involved a challenge by public school teachers to a collective bargaining agreement. The agreement required non-union members who were represented by the teachers union to pay a service fee equal to union dues. Some portions of this service fee were then used to pay "for political and ideological purposes unrelated to collective bargaining." *Id.* at 232. The Court held that this program violated the principle that "the freedom of an individual to associate for the purpose of advancing beliefs and ideas" is protected by the First Amendment. *Id.* at 233. Although the union could compel objectors to provide funds for purposes that were "germane" to "its duties as [a] collective-bargaining representative," it would violate basic principles of freedom of association to compel the financial support of objectors for ideological purposes unrelated to collective bargaining. *Id.* at 235. The Court revisited similar issues in *Keller* v. *State Bar of California*, 496 U.S. 1, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990), in which it invalidated a program in which mandatory dues to the California State Bar were used, over member's objections, to advance political and ideological causes to which some bar members did not subscribe. The Court held that the state bar could use compulsory membership dues to finance activities "germane" to the purposes for which the "compelled association and integrated bar [were] justified . . . the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13. It could not, however, order compulsory dues to be used to "fund activities of an ideological nature which fell outside of those areas of activity." *Id.* at 14. *Abood* and *Keller* set

forth the principles that were later applied—with differing results—in *Glickman* v. *Wileman Bros. & Elliott*, 521 U.S. 457, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (1997), and in *United Foods* to programs in which the government compels agricultural producers to contribute to joint marketing programs. In *Glickman*, the Court rejected a First Amendment challenge to a regulatory program that required tree fruit growers to fund marketing campaigns as part of a broader regulation of the industry. The crucial distinction between *Glickman* and *United Foods* is that the mandatory assessment in *Glickman* was "ancillary to a more comprehensive program restricting market autonomy." *United Foods*, 533 U.S. at 411. We have explained the distinction between the two cases as follows: "If the generic advertising assessment is part of a 'comprehensive program' that 'displaces many aspects of independent business activity,' exempts the firms within its scope from the antitrust laws, and makes them 'part of a broader collective enterprise,' the assessment does not violate the First Amendment." *Delano Farms* v. *Cal. Table Grape Comm'n*, 318 F.3d 895, 898-99 (9th Cir. 2003). The program in *United Foods*, on the other hand, raised a constitutional problem because "if the program is, in the main, simply an assessment of independent and competing firms to pay for generic advertising, it does violate the First Amendment." *Id.* at 899. The *United Foods* rule protects against "making one entrepreneur finance advertising for the benefit of his competitors" when there is no broader regulatory interest at stake. 533 U.S. at 418 (Stevens, J., concurring).

Seen in this perspective, *United Foods* is a logical extension of a long line of cases that have protected both freedom of expression and freedom of association. *See United States* v. *Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989) (describing the "underlying rationale of the right to be free from compelled speech or association" as guiding the *Abood* line of cases).

Under *Wooley* and *Barnette*, the First Amendment does not permit the government to force citizens to express beliefs that are not their own. As an extension of this principle, under *Abood*, *Keller* and *United Foods*, the First Amendment also does not permit the government to force citizens to contribute to a private association when the funds are used primarily to support expression from a certain viewpoint.[5] The First Amendment may, however, under *Abood* and *Glickman*, permit the government to compel contributions to an association's expression when that expression is germane to a broader regulatory scheme that compelled the association in the first place.[6]

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[5] Read in this context, it is clear that *United Foods* relied on harm to expressive and associational freedoms in order to support its conclusion. *See* 533 U.S. at 413 ("It is true that the party who protests the assessment here is required simply to support speech by others, not to utter the speech itself. We conclude, however, that the mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.") (emphasis added). The Court emphasized that contributions to the Mushroom Council forced certain private parties to pay for the speech of other private parties—a violation of both expressive and associative freedom. *Id.* at 416 (noting "the mandatory assessments imposed to require one group of private persons to pay for speech by others").

[6] Because *United Foods* is easily reconciled with previous Supreme Court precedent, we do not see a basis in *United Foods* for our dissenting colleague's view that, in distinguishing *Glickman*, the Court intended to untether the compelled speech doctrine from its expressive and associational moorings and create a new constitutional right to challenge all forms of targeted taxation. Nor does *United Foods* suggest that we should apply principles governing government suppression of private commercial speech, *see Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980), to this case—in which the (...continued)

Nothing in *United Foods* suggests that the compelled speech doctrine applies to situations where the government imposes an excise tax on private citizens and then uses the money to speak in the name of the government itself. No court has held otherwise. *See NAACP* v. *Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("*Abood* has never been applied to the government, however; if it were, taxation would become impossible."). An otherwise valid tax for an otherwise valid purpose ordinarily must bind even those who object to the government's objective. In *Board of Regents of the University of Wisconsin System* v. *Southworth*, 529 U.S. 217, 229, 146 L. Ed. 2d 193, 120 S. Ct. 1346 (2000), the Court explained that:

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.

Put simply, the rationale of the *Abood* and *Keller* line of cases—protecting freedom of expression and association—does not apply to government speech when the government acts as both a taxing authority and as a

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government has neither suppressed nor compelled speech, but has merely used an excise tax to fund a governmental message. Surely if the Court in *United Foods* had intended to create such broadly sweeping principles, it would have said so.

speaker. Paying a tax, even an excise tax, does not create a compelled form of association. When the government acts as a speaker it may espouse views that directly contradict those of taxpayers without interfering with taxpayers' freedom of expression. In a democracy based on majority rule, such a conclusion is inescapable. "Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. . . . If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller*, 496 U.S. at 12-13. As we have said before, "simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist." *Downs* v. *Los Angeles Unified School Dist.*, 228 F.3d 1003, 1013 (9th Cir. 2000).

B. The California Regulation and Compelled Speech

The companies claim that their situation is unique because the DHS pays for its anti-industry ads exclusively from revenues raised ultimately through the surtax, which in turn is derived exclusively from sales of cigarette packages. They argue that imposing an excise tax on a particular industry and then earmarking the use of the tax funds for advertisements that criticize that industry suffices to make the companies similarly situated to the plaintiffs in the compelled speech cases.

There is a fundamental difference between the excise tax/spending regime at issue here and the compelled contributions to private associations that were at issue in *Abood*, *Keller* and *United Foods*. When a union, a state bar association or even a mushroom growers' association speaks, it represents only the interests of that particular entity. When California uses funds from the tobacco

surtax to produce advertisements, it does so in the name of all of California's citizens. As the district court observed, "[The tobacco companies] are not seeking to prevent coerced participation in private association; rather, they are attempting to exercise a taxpayer's veto over speech by the government itself." *Bonta*, 272 F. Supp. 2d at 1100. That California has chosen to fund a valid public health message through a targeted excise tax does not mean that it is no longer speaking as the State of California.

The key issue is not the targeted nature of the tax but the degree of governmental control over the message. *See Livestock Mktg. Ass'n* v. *USDA*, 335 F.3d 711, 723 (8th Cir. 2003) (noting that "the greater the government's responsibility for, and control over, the speech in question, the greater the government's interest therein"). In the compelled speech cases cited by the companies, control over the content of the message produced had been delegated to an association "representative only of one segment of the population, with certain common interests." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring). The problem with the government forcing private citizens to contribute funds in those cases was that the funds were being used to support the speech of such segmented, specific interests. Here there can be no doubt that the tobacco companies' funds are being used to speak on behalf of the people of California as a whole. Any coercion—that is, the collection of funds used to produce a particular message—is performed not in the name of a segment of the public, but of the state.

Indeed, a wide range of First Amendment cases differentiate between the government controlling the expenditure of its own revenue and the government sharing control with private or quasi-private parties. *See, e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173, 197, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991) (distinguishing situations where the government imposes a direct constraint on the

use of its own money from situations "in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program"); *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 399-400, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984) (same); *Widmar* v. *Vincent*, 454 U.S. 263, 268, 70 L. Ed. 2d 440, 102 S. Ct. 269 (1981) (establishing limited public forum doctrine and explaining that the First Amendment "forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place").

This is not to say that a state may avoid the limits of the First Amendment simply by labeling a compelled contribution a contribution to the government's own speech. As the Supreme Court has noted, a state law "determination that [an entity] is a 'government agency,' and therefore entitled to the treatment accorded a governor, a mayor, or a state tax commission, for instance, is not binding on us when such a determination is essential to the decision of a federal question." *Keller*, 496 U.S. at 11. The analysis may differ when the government nominally controls the production of advertisements, but as a practical matter has delegated control over the speech to a particular group that represents only one segment of the population. *See Frame*, 885 F.2d at 1133-34 (describing compelled contributions to a nominally government controlled "Cattleman's Board," where the persons with actual control over the disbursement of funds were private individuals "whose primary or overriding purpose is to promote the welfare of the cattle producers" (quoting 7 U.S.C. § 2905(b)(4))); *see also Mich. Pork Producers Ass'n* v. *Veneman*, 348 F.3d 157, 161 (6th Cir. 2003) ("We

conclude that the pork industry's extensive control over the Pork Act's promotional activities prevents their attribution to the government.").[7] But that situation is not present here. As the district court put it, "while in some cases the distinction between government speech and compelled allegiance may present 'difficult issues,' the analysis here is straightforward." *Bonta*, 272 F. Supp. 2d at 1100 (quoting *United Foods*, 533 U.S. at 417).

In their complaint, the tobacco companies themselves allege that the director of the DHS, a government agency, is "ultimately responsible for the advertising challenged in this action." The DHS is acting expressly according to California law, which directs the DHS to implement a media campaign emphasizing "both preventing the initiation of tobacco use and quitting smoking . . . based on professional market research and surveys necessary to determine the most effective method of diminishing tobacco use among specified target populations." Cal.

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[7] Thus, the dissent's claim that there is an "untenable distinction" between situations in which the government speaks for itself and situations where the government has effectively licensed control over speech to a private organization is misplaced. In similar cases, courts can (and often have) examined whether or not the government has delegated authority to a private body, such that a compelled subsidy is being used to support a private interest instead of a governmental one. *See, e.g.*, *Cochran* v. *Veneman*, 359 F.3d 263, 278 (3d. Cir. 2003) (finding First Amendment concerns where an agricultural act "seemed to really be special interest legislation on behalf of the industry's interest more . . . than the government's"). Indeed, this was what was at issue in the language the dissent quotes from the Third Circuit's decision in *Frame*; that court identified an improper "coerced nexus between the individual and . . . specific expressive activity" in a case where "the Cattlemen's Board seems to be an entity 'representative of one segment of the population, with certain common interests.' " *Frame*, 885 F.2d at 1132, 1133 (citing *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring)).

Health & Safety Code § 104375(e)(1). The advertisements are also clearly identified as coming from the government itself and not from the tobacco companies, the tobacco industry or any other private party or group. *Cf. Frame*, 885 F.2d at 1133 n.11 (describing advertisements "without mention of the Secretary or the Department of Agriculture, thus failing to communicate that the advertisements are funded through a government program"). As noted above, all the contested advertisements expressly state that they are sponsored by the DHS. Plainly, in imposing the surtax and in producing the contested advertisements, California is acting on behalf of all of its citizens.[8]

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[8] As a point of comparison, it is worth citing those aspects of the organization of the State Bar of California upon which the Supreme Court relied to hold that its speech should not be classified as coming from the government itself:

> The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as "governmental agencies." Its principal funding comes, not from appropriations made to it by the legislature, but from dues levied on its members by the board of governors. Only lawyers admitted to practice in the State of California are members of the State Bar, and all 122,000 lawyers admitted to practice in the State must be members. [The State Bar] undoubtedly performs important and valuable services for the State by way of governance of the profession, but those services are essentially advisory in nature. The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, and it does not ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State

(...continued)

C. Excise Taxation, Government Speech and the First Amendment

In short, by being required to contribute to the DHS's advertisements, the tobacco companies have not been deprived of their freedom of expression or their freedom of association, which are the harms that the compelled speech cases protect against. The tobacco companies' claim goes to another kind of harm—the harm caused by paying an excise tax used to fund government speech of which they understandably disapprove.

The tobacco companies concede that the state would not have violated the First Amendment had it imposed the same surtax on cigarette packs, commingled the proceeds of the surtax with the state's general fund and then used the general fund to produce precisely the same

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> Supreme Court. . . . The State Bar of California was created, not to participate in the general government of the State, but to provide specialized professional advice to those with the ultimate responsibility of governing the legal profession. Its members and officers are such not because they are citizens or voters, but because they are lawyers. We think that these differences between the State Bar, on the one hand, and traditional government agencies and officials, on the other hand, render unavailing [the State Bar's] argument that it is not subject to the same constitutional rule with respect to the use of compulsory dues as are labor unions representing public and private employees.

Keller, 496 U.S. at 11, 13 (footnotes and citations omitted). Here, by contrast, the contested advertisements are unquestionably part of the "general government of the state."

advertisements. Thus, the tobacco companies object only to the nexus between the excise tax and the advertisements. Federal courts have traditionally given great deference to a state's control over its financial affairs when faced with constitutional challenges. *See, e.g.*, *San Antonio Independent Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 40, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973) (noting, in a challenge under the Equal Protection Clause, that "this Court has often admonished against such interferences with the State's fiscal policies"); *see also Welsch* v. *Likins*, 550 F.2d 1122, 1131-32 (8th Cir. 1977) ("No right of a state is entitled to greater respect by the federal courts than the state's right to determine how revenues should be raised and how and for what purposes public funds should be expended."). The Supreme Court has repeatedly emphasized that deference not warranted in other regulatory areas is warranted when it comes to the tax system. *Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 547-548, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes. . . . 'In taxation, even more than in other fields, legislatures possess the greatest freedom in classification.'" (quoting *Madden* v. *Kentucky*, 309 U.S. 83, 87-88, 84 L. Ed. 590, 60 S. Ct. 406 (1940))). The tobacco companies can point to no case in which, when the state has the right both to impose the relevant tax and to promulgate the relevant speech, the First Amendment mandates that a state arrange its budgetary categories so as to make the link between a tax and speech less direct.

The implication of the tobacco companies' argument is that industries subject to an excise tax are entitled to a special veto over government speech funded by the tax. Such a right, in turn, would suggest that excise taxes, especially those that earmark funds for particular purposes, are so unusual or improper that they should allow payors of those taxes to avoid the political process and use the courts to control government speech. This

suggestion fundamentally misunderstands the history of taxation in the United States, because excise taxation targeted at particular goods or industries is not only common but predates the income tax. *See* U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts *and Excises*") (emphasis added); THE FEDERALIST NO. 12 (Alexander Hamilton) ("In America, far the greatest part of the national revenue is derived from taxes of the indirect kind, from imposts, and from excises."). One of the earliest Supreme Court cases upheld a uniform national excise tax on carriages. *Hylton* v. *United States*, 3 U.S. (3 Dall.) 171, 1 L. Ed. 556, 3 Dall. 171 (1796). And excise taxes are hardly unusual today. According to the Office of Management and Budget, the federal government collected approximately 67 billion dollars in excise taxes in 2002. *See* Office of Management and Budget, Budget for Fiscal Year 2004, Summary Tables, at *http://www.whitehouse.gov/omb/budget/fy2004/summarytables.html* (last visited Aug. 23, 2004).

Nor is it a novel feature of American government to levy an excise tax on a particular industry and then use the proceeds of that tax in ways that regulate that industry. The nineteenth century Supreme Court upheld (albeit not against a First Amendment challenge) a federal tax statute that required distillers of alcohol to both pay an excise tax and pay the salaries of federal officers supervising the production of alcohol. *United States* v. *Singer*, 82 U.S. (15 Wall.) 111, 118-19, 122, 21 L. Ed. 49 (1872) (upholding an act requiring distillers to "'reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of . . . warehouses'"). Excise taxes levied in the name of public health have long been held constitutionally permissible, even when such taxation has put severe burdens on particular industries. *See McCray* v. *United States*, 195 U.S. 27, 63, 49 L. Ed. 78, 24 S. Ct. 769, Treas. Dec. Int. Rev. 795 (1904) (upholding, as an exercise of Congress's

ability to protect public health, the constitutionality of an excise tax on artificially colored oleomargarine "although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine"); *Patton* v. *Brady*, 184 U.S. 608, 623, 46 L. Ed. 713, 22 S. Ct. 493 (1902) (upholding an excise tax on tobacco and noting that "it is no part of the function of a court to inquire into the reasonableness of the excise either as respects the amount or the property upon which it is imposed").

Today, a tax on heavy trucks and trailers is dedicated to a fund intended to improve highways. See 26 U.S.C. § 9503 (establishing a "Highway Trust Fund"); 26 U.S.C. § 4051 (imposing a retail tax on heavy trucks and trailers dedicated to the Highway Trust Fund). A tax on fishing equipment is dedicated to government action to preserve fisheries. *See* 26 U.S.C. § 9504(a) (establishing an "Aquatic Resources Trust Fund"); 26 U.S.C. § 4161 (imposing an excise tax on sport fishing equipment dedicated to the Aquatic Resources Trust Fund). Yet we would not conclude that the manufacturers of large trucks have a First Amendment right to veto government speech on highway safety, or that the makers of sonar fish finders have a First Amendment right to direct government speech on fishery management.

There is thus a long history of excise taxation directed at particular industries in the name of public health and welfare. Despite this history, not one court has upheld a right of an industry to block otherwise legitimate government activity simply because the industry pays an excise tax. The tobacco companies offer no reason why they should be entitled to such unique treatment here.

Significantly, the tobacco companies have not offered any principle that could limit the consequences of sustaining their objection. Although the companies claim that they object only to the denigratory advertisements at

issue here, they offer no principled basis for limiting their "nexus" theory to such advertisements alone. For example, the tobacco companies do not explain why, if their First Amendment rights have been violated solely because of a nexus between the surtax and the challenged advertisements, they would not also have a right to challenge the use of surtax funds for anti-tobacco education in the public schools to the extent that they disagreed with the state's educational message.

Thus, if the tobacco companies were permitted to object to government speech simply because they pay an excise tax used to fund speech contrary to their interests, the result could be not only to reduce government's ability to disseminate ideas but also an explosion of litigation that could allow private interests to control public messages. There are numerous taxpayers who contribute disproportionately through excise taxes to government speech with which they disagree. If each were to have a similar right to challenge what it may deem government "propaganda," the government's ability to perform crucial educational and public health activities in the interests of all citizens would be hampered. *Cf. Downs*, 228 F.3d at 1015 (noting that if a First Amendment violation applied to government speech, "[the plaintiff] would be able to do to the government what the government could not do to [the plaintiff]: compel it to embrace a viewpoint.")

D. Other Limitations on Government Speech and the Power to Tax

At the risk of repetition, we emphasize that the tobacco companies do not argue that the government's speech itself is constitutionally impermissible; nor do they argue that the government has burdened their First Amendment rights through the exercise of its power to tax. Were the tobacco companies challenging a California restriction on their ability to express their views, our analysis would be different. As the district court noted, there are already several recognized instances of

constitutional limitations on government speech and "government is no more free to disregard constitutional and other legal norms when it speaks than when it acts." *Bonta*, 272 F. Supp. 2d at 1110. For example, there may be instances in which the government speaks in such a way as to make private speech difficult or impossible, or to interfere with some other constitutional right, which could raise First Amendment concerns. *See Warner Cable Communications, Inc.* v. *City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) ("The government may not speak so loudly as to make it impossible for other speakers to be heard by their audience. The government would then be preventing the speakers' access to that audience, and first amendment concerns would arise.").

Another limitation on government speech is found in the Establishment Clause. *See Bd. of Educ. of Westside Cmty. Schs.* v. *Mergens*, 496 U.S. 226, 250, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990) ("There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (emphasis in original). The dissent, quoting a passage often used by the tobacco companies in this litigation, invokes Thomas Jefferson's pronouncement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." P. Kurland & R. Lerner, eds., 5 *THE FOUNDERS' CONSTITUTION* 77 (1987). As the district court carefully explained,

> The quoted statement is taken from Jefferson's Virginia Bill for Establishing Religious Freedom, a landmark anti-establishment measure declaring that 'no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever.' *Id.* It is perhaps significant that the statement arose in this

> context, since 'the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.' *Lee* v. *Weisman*, 505 U.S. 577, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992).

Bonta, 272 F. Supp. 2d at 1107 n.25. Jefferson's comment was directed to a situation in which the government speech itself was improper, not to valid taxation used to fund valid governmental speech.

There are also strict limits on the government's ability to impose taxes that are "general law[s] singling out a disfavored group on the basis of speech content." *Rust*, 500 U.S. at 194; *see also Arkansas Writers' Project, Inc.*, 481 U.S. at 228-29.[9] A government tax designed to suppress the speech of a targeted group would raise serious First Amendment concerns.

But these are issues not before us. On this record, we need not determine the metes and bounds of constitutionally permissible government speech; nor need

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[9] Concerns about forced expression, repression of speech, improper taxation and interference with other constitutional rights could arise, for example, under the facts of *Summit Medical Center* v. *Riley*, 284 F. Supp. 2d 1350, 1353-54 (M.D. Ala. 2003), a case cited to us by the tobacco companies. In *Summit Medical*, it appears that the state of Alabama designed a program to suppress abortion clinics' ability to disseminate independent information, requiring the clinics to purchase from the state and then display information intended to dissuade women from obtaining abortions. The plaintiffs in Summit Medical challenged the burden this mandatory purchase-and-display program imposed upon their own expression, as well as its compulsory and discriminatory nature. *Id.* at 1354. We take no position on the correctness of the district court's decision in *Summit Medical*, but note that it confronted a factual situation very different from the one we consider here.

we articulate abstract limits on the state's power to tax. We share our dissenting colleague's concern that the government not use its taxation power to suppress the free expression of disfavored groups, but the tobacco companies claim no suppression of ideas. The nexus between excise taxation and government speech is the only First Amendment argument they raise, and we limit ourselves to that issue alone. For the reasons set out above, we reject the companies' argument.

II. Seventh Amendment and Due Process Claims

The tobacco companies also raise a novel claim under the Seventh Amendment. They note that they face litigation in state and federal courts. They argue that because the advertisements publicly disparage the reputation and character of the tobacco industry, their right to receive a jury trial under the Seventh Amendment has been infringed because potential future jurors in potential future trials could be biased by the advertising. They do not, however, allege that any actual trial in which they have participated was rendered unconstitutionally unfair by the challenged advertisements.

There are a number of problems with this argument. The companies cite only to cases involving a criminal defendant's Sixth Amendment right to jury trial in criminal cases or to interpretations of the procedural rules governing the federal courts, and not to any case suggesting that they have an independent Seventh or Fourteenth Amendment right to be free of disparaging state speech before a civil trial. Moreover, as the district court noted, the Seventh Amendment's guarantee of the right to a civil trial by jury does not apply to the states and was not incorporated into the Fourteenth Amendment. *See Dohany* v. *Rogers*, 281 U.S. 362, 369, 74 L. Ed. 904, 50 S. Ct. 299 (1930); *Walker* v. *Sauvinet*, 92 U.S. 90, 92, 23 L. Ed. 678 (1875). Therefore, whether parties may raise claims against state officials under 42

U.S.C. § 1983 for Seventh Amendment violations is questionable.

We need not consider these issues, however. Even assuming that the tobacco companies may properly allege a violation of Seventh or Fourteenth Amendment rights due to juror bias created by these advertisements, the proper context for raising such issues is an actual jury trial where a court could consider whether real jurors actually have been biased. Allegations of juror bias are traditionally resolved by the court conducting the trial, not courts considering hypothetical future proceedings. *See Smith* v. *Phillips*, 455 U.S. 209, 217, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing [conducted by the trial court]."). None of the cases cited by the companies supports their asserted right to be free from negative publicity because potential jurors may be prejudiced in potential cases, and we are aware of no case that supports their claim that this court should enjoin certain speech in order to protect the alleged injury occurring in another court.

The tobacco companies do not allege the elements of stigmatization that would violate their due process rights. *Cf. Wisconsin* v. *Constantineau*, 400 U.S. 433, 436, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971) (establishing that stigma can change a person's legal status and therefore constitute a violation of due process). The companies cannot meet the requirements of the "stigma-plus" test established in *Paul* v. *Davis*, where the Supreme Court explained that in addition to reputational harm, a due process stigma claim must assert that a recognized liberty or property right, as secured by the due process clauses, has been violated. 424 U.S. 693, 701, 47 L. Ed. 2d 405, 96

S. Ct. 1155 (1976); *see also WMX Techs., Inc.* v. *Miller*, 197 F.3d 367, 374 (9th Cir. 1999) ("Reputation, without more, is not a protected constitutional interest."). The companies assert that the alleged deprivation of their right to a fair jury trial is sufficient to meet the stigma-plus test. In essence, the companies are trying to bootstrap two arguments about reputational harm to create a single claim—arguing that the reputational harm creates juror bias, and that the juror bias combined with reputational harm creates a constitutionally improper stigma. We reject such an attempt at bootstrapping. *See Paul*, 424 U.S. at 712 ("Petitioners' defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause.").

CONCLUSION

For the reasons set forth above, we affirm the judgment of the district court.

AFFIRMED.

POSTSCRIPT

After we filed our opinion, the Supreme Court decided *Johanns* v. *Livestock Marketing Ass'n*, 161 L. Ed. 2d 896, 125 S. Ct. 2055 (2005), holding that the Beef Promotion and Research Act of 1985 did not violate the First Amendment by imposing an assessment on all sales and importation of cattle to fund beef promotional campaigns with which many of the assessed parties disagreed. The Court reasoned, as we do here, that the Act was not susceptible to a First Amendment compelled-subsidy challenge because the assessments funded government speech. Although the *Johanns* opinion affirms our reasoning, Judge Trott remains in dissent. He would now remand to the district court pursuant to the Court's

statement in *Johanns* that an as-applied challenge might lie "if it were established . . . that individual beef advertisements were attributed to respondents." *Id.* at 2065.

Appellants have never, before us or the district court, claimed that the ads at issue in this litigation could be or were attributed to them; nor does the record reveal a material question of fact on the issue. A reasonable viewer could not believe that these anti-industry ads, expressly identified as "Sponsored by the California Department of Health Services," were created, produced or approved by the appellants. The ad singled out by the dissent as "putting [words] directly into the mouth of the tobacco industry," for example, is unmistakable satire. In that ad, children play in a schoolyard while cigarettes fall like rain from the sky and a voiceover states "we have to sell cigarettes to your kids. We need half a million new smokers a year . . . so we advertise near schools, at candy counters." No reasonable viewer could overlook the satirical tenor of this ad and attribute the voiceover text to actual tobacco executives.

We also find inapposite the dissent's analogy to our recent order in *Charter* v. *United States Department of Agriculture*, 412 F.3d 1017 (9th Cir. 2005). We remanded on the question of attribution in that case because the record indicated that the National Cattlemen's Beef Association "routinely, before Congress, and in other public ways and in press announcements, states that it is the trade organization and marketing organization of America's one million cattle producers." *Id.* at 1019. The record in this case contains no evidence that the state ever attributed its ads to the appellants or that a reasonable viewer could have done so; accordingly, we reject the analogy to Charter and decline Judge Trott's invitation to remand.

AFFIRMED.

DISSENT:

TROTT, Circuit Judge, Dissenting:

> To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.[10]

Thomas Jefferson

The atmospheric challenge in this case, which is one we often face, is to focus not on the overwhelming demerits of the underlying subject matter—smoking—but on the primary constitutional principle at issue: whether consistent with the First Amendment's right against government abridgement of freedom of speech—which includes "the right to refrain from speaking at all"[11]—a state can compel reluctant individuals and private entities directly and exclusively to pay for and to support a public interest message with which the entities disagree and which subjects them public scorn, obloquy, and even hatred. It would be a mistake in this principled context to become overly distracted by the medical, physical, personal, financial, and addictive havoc knowingly inflicted for profit upon the public by the tobacco industry; or to be influenced by the hundreds of thousands of premature, preventable, and horrible smoking deaths caused by cancer, emphysema, heart and lung disease, and stroke. There is little doubt that government, in its role as steward of the public's general welfare, can mount a vigorous public campaign against smoking and the tobacco industry, and that it can do so with general tax

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[10] *See, e.g.*, *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209, 235 n. 31, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977).

[11] *Wooley* v. *Maynard*, 430 U.S. 705, 714, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977).

revenues and by way of "government speech;" but can government do so using this particular compulsory funding mechanism? Today the target of government dislike is smoking, but tomorrow it will be something else, such as Alabama's imposition, in its the Woman's Right to Know Act, of a fee applied to abortion providers for the production by the state of pro-childbirth materials which the providers did not wish to endorse, much less purchase. *See* Ala. Code §§ 26-23A-1 to 13; *Summit Medical Center of Alabama, Inc.* v. *Riley*, 284 F. Supp. 2d 1350 (M.D. Alabama 2003). Who knows whose disfavored ox or whose industry or business or lifestyle will be the next to be fatally gored in this manner by a well-intentioned government.

Moreover, hanging over this controversy like a blinking yellow light in the constitutional sky is Chief Justice Marshall's timeless admonition in *McCulloch* v. *Maryland*, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819), that "the power to tax is the power to destroy." This warning is not only memorable, but it reminds us that might, especially in the hands of government, does not always make right.

There appears no doubt that California's goal is to destroy the industry singled out for this targeted and exclusive tax. Although an earnest deputy attorney general denied this lethal purpose during oral argument, claiming that the Act's only purpose was to inform the public, her boss, the Attorney General of California William Lockyer, forthrightly said differently after the hearing. Attorney General Lockyer, who took the unusual step of attending the argument himself, is quoted by the Los Angeles Daily Journal as calling the tobacco companies "merchants of death" and agreed that the ad campaign aimed to put them out of business. He added that "the democratic process will provide a check on the use of taxes to fund such messages. Elected officials are responsible for appropriating the money . . . . If voters

don't like the message, they can oust the messenger."[12] Query.

So this is the issue: can government, consistent with the First Amendment's right against the abridgment of free speech, create a public information program against an industry funded by a targeted excise tax imposed solely upon that industry and which is segregated in a special state health education account? Not surprisingly, in our system which values not just good goals but also the right process, the question here is not ends, but means.

DISCUSSION

First Amendment Claim

1. Government and Compelled Speech

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. It is axiomatic that "just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views . . . or from compelling certain individuals to pay subsidies for speech to which they object."[13] *United*

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[12] Los Angeles Daily Journal, Tuesday, May 11, 2004, "Court revisits anti-smoking ad campaign."

[13] *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943) provides an often quoted passage regarding the extension of free speech protections to those who wish not to speak: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

(...continued)

States v. *United Foods*, 533 U.S. 405, 410, 150 L. Ed. 2d 438, 121 S. Ct. 2334 (2003). In *United Foods*, the latest in a series of compelled assessments cases, the Supreme Court held that government's forced assessments of mushroom producers, which funded advertisements promoting mushroom sales, violated the First Amendment. Relying primarily upon *United Foods*, appellants assert that California's targeted tax, which funds anti-industry advertisements, violates their right against compelled financing of speech.

By labeling the anti-tobacco advertisements "government speech," the majority concludes that the targeted tax is clear of First Amendment concerns. I respectfully disagree. Though the Supreme Court has embraced the existence of a "government speech" doctrine in this general context, *United Foods*, 533 U.S. at 417, the Court has not provided a clear explanation of the reach or proper application of the doctrine. The appellants assert that the central question is the source of the funding for the particular speech, contending that a targeted tax on a particular group to fund speech opposed to by that group constitutes unconstitutional compelled speech. Ultimately, the State's argument that the First Amendment's protections against compelled speech can be avoided by finding that the speech is spoken by the government is at odds with the force and logic of controlling authority.

2. Government Speech

Focusing on the Supreme Court's brief reference to the government speech inquiry in *United Foods*, and the Court's discussion of government speech in other contexts, *see, e.g.*, *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 130 L. Ed. 2d 902, 115 S. Ct. 961 (1995), the

State asserts that the government is free from First Amendment concerns "when the state is the speaker." *Rosenberger* v. *Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995).[14] Specifically, the State asserts that because the speech at issue is not explicitly attributed to appellants, the free speech concerns of traditional compelled speech cases, *see, e.g.*, *Wooley*, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428, are absent. Moreover, the state asserts that the source of the State's funding for its speech is irrelevant to the question of the constitutionality of the particular speech.

The State's arguments, however, are not consistent with the trajectory and force of the Supreme Court's recent compelled speech jurisprudence. Specifically, the State's framework ignores the central lesson of *United Foods*: in that case, the Supreme Court reigned in its previous pronouncements in *Glickman* v. *Wileman Bros. & Elliott*, 521 U.S. 457, 476, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (1997) that coerced government speech is akin to economic regulation and not entitled to First Amendment protection. *See Glickman*, 521 U.S. at 476. Instead, the *United Foods* Court propounded a broad constitutional

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[14] I note that the State also supports its position with general pronouncements made by the Court in its compelled assessments of speech cases indicating that the proper functioning of government requires the government to have control over the nature and content of its speech. *See, e.g.*, *Keller* v. *State Bar of California*, 496 U.S. 1, 12-13, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990) ("Government officials are expected as part of the democratic process to represent and espouse the views of a majority of their constituents. . . . If every citizen were to have a right to insist that no one paid by public funds to express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it would be radically transformed.")

protection against compelled contributions for commercial speech. *See United Foods*, 533 U.S. at 414. Indeed, applying *United Foods*, one court has held that the issue of government speech, which generally involves the state's power to control the content of its speech, is fundamentally different from the "government's authority to compel [plaintiffs] to support speech with which they personally disagree; such compulsion is a form of 'government interference with private speech.' " *Livestock Marketing Ass'n* v. *USDA*, 335 F.3d 711, 720 (8th Cir. 2003) (holding compelled contributions in beef promotion violated First Amendment) (certiorari granted in part by *Veneman* v. *Livestock Marketing Ass'n*, 541 U.S. 1062, 158 L. Ed. 2d 962, 124 S. Ct. 2389 (U.S. May 24, 2004) and *Nebraska Cattlemen, Inc.* v. *Livestock Marketing Ass'n*, 541 U.S. 1062, 158 L. Ed. 2d 962, 124 S. Ct. 2390 (U.S. May 24, 2004). As Justice Thomas stressed in concurrence, "any regulation that compels the funding of advertising must be subjected to the most stringent First Amendment scrutiny." *United Foods*, 533 U.S. at 419 (Thomas, J., concurring). Finally, the State's argument necessarily relies on an untenable distinction between government speech activities paid directly from the government treasury, or coordinated by traditional government agencies, and those that are coordinated by more complex regulatory organizations and schemes, even when such schemes are funded and run by the government. As one commentator has noted, "government speech cannot logically be made a function of the office of the person making the allocation decision. That approach would elevate form over substance and would enable the government to dictate the First Amendment result simply by manipulating the agency in the decision-making process." Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1430 (2001).

Accordingly, recognizing the principle expressed in *United Foods*, the appellants clearly have a First

Amendment interest at stake that is not erased by pigeonholing the ads as "government speech." The question remains, however, whether the compelled speech does indeed violate appellants' free speech rights, an analysis that is governed by the Supreme Court's compelled speech line of cases, including *Abood*, *Keller*, *Glickman*, and *United Foods*.

3. Compelled Speech

Appellants rely on the string of cases, beginning with *Abood*, concerning compelled contributions to speech, and assert that there exists the fundamental principle that, under the First Amendment, a discrete group should not be specifically taxed to fund speech with which they disagree. Indeed, this proffered principle provides a coherent picture of the puzzle with which courts have been struggling. *See, e.g.*, *Summit Medical Ctr. of Ala.* v. *Riley*, 284 F. Supp. 2d 1350, 1360 (holding that state's imposition of "a direct fee assessment on a limited class of citizens—abortion providers—and using the revenue to advance speech in support of the State's favored policy position on abortion" intruded on abortion provider's free speech rights) (emphasis added); *United States* v. *Frame*, 885 F.2d 1119 (3d Cir. 1989) ("Where the government requires a publicly identifiable group to contribute to a fund earmarked for the dissemination of a particular message associated with that group, the government has directly focused its coercive power for expressive purposes.") (citation omitted) (emphasis added). The *United Foods* Court announced that the "question is whether the government may underwrite and sponsor speech with a certain viewpoint using special subsidies exacted from a designated class of person, some of whom object to the idea being advanced." *United Foods*, 533 U.S. at 410. And in *United Foods*, the Court answered: No. *Id.* at 411.

In answering the question, however, the Court was forced to distinguish another recent compelled speech

case, *Glickman*, which was factually similar to *United Foods*, but where the Court had found that no First Amendment issues were raised by the forced subsidies. 521 U.S. at 460. In *Glickman*, the Court determined that "criticisms of generic advertising provide no basis for concluding that factually accurate advertising constitutes an abridgement of anybody's right to speak freely." *Id.* at 474. The *United Foods* Court distinguished *Glickman* by asserting that the program in *Glickman* "mandated assessments for speech [which] were ancillary to a more comprehensive program restricting marketing autonomy." *United Foods*, 533 U.S. at 411-12.

Thus, after distinguishing Glickman, and finding that First Amendment interests were at stake, the Court proceeded to apply the tenets established in *Abood* and *Keller*, which established the "germaneness test." *United Foods*, 533 U.S. 405, 150 L. Ed. 2d 438, 121 S. Ct. 2334. That test requires any coerced subsidized speech be germane to the larger purpose of the association at issue. *Abood*, 431 U.S. at 235 (holding that union can only finance speech not germane to collective bargaining with non-objecting members' funds); *Keller*, 496 U.S. at 13-14 (holding that state bar association can only compel payment for activities related to bar's purposes).[15]

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[15] I note that the district court's decision relied on the question of association and stressed the non-associational nature of the tobacco industry being taxed, thereby distinguishing the *Abood* line of cases. Those cases stressed that there exists "a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.' " *Glickman*, 521 U.S. at 471 (quoting *Abood*, 431 U.S. at 235). The district court found that because the appellants subject to the surtax were not members of a particular association, their free speech rights were not undermined by any compelled financing of speech made on behalf of that association. This finding is also supported by some of the Court's language in *United Foods*, where it noted (...continued)

Guided by *Glickman* and *United Foods*, and looking at the statutory scheme provided in the Act, it is clear that the tobacco companies are not similarly situated to the tree growers in *Glickman*, as they are not "bound together and required by statute to market their products according to cooperative rules" for purposes other than advertising or speech. *United Foods*, 533 U.S. at 412. Nor is the statutory scheme directly congruous with that in *United Foods*, as the ads in this case are a part of a larger regulatory scheme, and thus not clearly "a program where the principal object is speech itself." *Id.* at 415. Thus, the Act is different from both the statute analyzed in *United Foods* and the statute in *Glickman*. Moreover, the fact that the speech at issue involves, not the promotion of the relevant group's product, but the disparagement of the entire industry, only increases the difficulty of resolving this case.

Given the unique nature of the question presented, proper review of the Act must acknowledge *United Foods*'s obvious retreat from *Glickman*, and the Court's

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that there is "a threshold inquiry . . . whether there is some state imposed obligation which makes group membership less than voluntary; for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place." *United Foods*, 533 U.S. at 413. However, hinging the right to be free from compelled commercial speech on whether there is an associational interest at stake ignores the obvious fact of what the Court actually did in *United Foods*. Indeed, the Court not only found that the compelled subsidies constituted an unconstitutional infringement on the dissenting mushroom grower's speech rights, but it did so after expressly distinguishing *Glickman* on the grounds that there was no "regime of cooperation" as presented in *Glickman*. *Id.* at 415. Therefore, though the Court saves some of its associational rights rhetoric, the practical effect of its decision in *United Foods* is to unhinge its compelled speech analysis from the previously-pronounced requirement that there be an involuntary group membership.

pronouncement of broadened protection against compelled speech. In this regard, as the appellants assert, *United Foods* and the Court's previous compelled speech case law can be reconciled and understood by applying what *United Foods* explicitly stated: the First Amendment forbids certain compelled assessments from "a particular citizen, or a discrete group of citizens, to pay special subsidies for speech." 533 U.S. at 411.

As the Third Circuit recently explained, however, though a case may be properly characterized as a compelled speech case, "the Supreme Court . . . has left unresolved the standard for determining the validity of laws compelling commercial speech . . . ." *Cochran* v. *Veneman*, 359 F.3d 263, 277 (3rd Cir. 2004). In *Cochran*, the court also explained that there are several standards available which the courts may try to apply: 1) the lenient standard derived from commercial speech cases, *see, e.g.*, *Central Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 564, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980), or some adaptation of that commercial speech standard, *see, e.g.*, *Livestock Marketing*, 335 F.3d at 722-23; 2) the "germaneness test" of traditional compelled speech cases, *see, e.g.*, *Abood*, 431 U.S. at 235-36, and 3) the stringent standard of associational cases, *see, e.g.*, *United States* v. *Frame*, 885 F.2d 1119 (3rd Cir. 1989).

The speech and the funding mechanism in this case is questionable under whatever standard one uses. In *Central Hudson*, the Court held that commercial speech is to be evaluated using intermediate scrutiny. That is, 1) the state must "assert a substantial government interest;" 2) "the regulatory technique must be in proportion to that interest;" and 3) the incursion on commercial speech "must be designed carefully to achieve the State's goal." 447 U.S. at 564. Under this standard, though never before

applied to compelled commercial speech cases,[16] the speech regulation at issue, and the targeted tax placed on appellants, constitutes a disproportional and overly burdensome regulatory technique, thereby failing the second and third prongs of the *Central Hudson* test. Indeed, the speech in this case is exceptional in its difference from what the Court has previously encountered in its compelled commercial speech cases. Whereas previous cases generally involve promotional activity, *see, e.g.*, *Glickman*, 521 U.S. at 474; *United Foods*, 533 U.S. at 413-14, here, California is specifically targeting one discrete and largely disfavored group, forcing that group to meet the State's regulatory goals by directly financing speech designed to undermine that group's status and reputation. Though the State's goals may be strong and laudatory, the methods used seriously undermine the particular group's speech rights and seem disproportional to the goals to be achieved. Accordingly, the Act cannot survive *Central Hudson*'s intermediate scrutiny.

Moreover, as did the Sixth Circuit in *Michigan Pork Producers Ass'n, Inc.* v. *Veneman*, 348 F.3d 157 (6th Cir. 2003), I "find inapplicable to this case the relaxed scrutiny of commercial speech analysis . . . ." *Id.* at 163 (citing *Glickman*, 521 U.S. at 474 n.18 (questioning whether "the *Central Hudson* test, which involved commercial speech should govern a case involving the compelled funding of speech"). The speech in this case is

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[16] I note, in this regard, that the Supreme Court in *United Foods* refused to apply the *Central Hudson* test because the "Government itself [did] not rely upon *Central Hudson* to challenge the Court of Appeals' decision." 533 U.S. at 410. Accordingly, other courts have recognized that the *Central Hudson* test has never been applied by the Supreme Court to compelled assessment of commercial speech cases. *See Cochran*, 359 F.3d at 277.

materially different from the speech issuing from the private sector that we normally label as commercial.

Applying the "germaneness test" derived from *Abood* and its progeny, the compelled speech here would also fail. The Supreme Court expressly applied this test in *United Foods*, and found that "the expression respondent [was] required to support [was] not germane to a purpose related to an association independent from the speech itself." *United Foods*, 533 U.S. at 415-16. Of course, as previously explained, there is no relevant association of tobacco companies for purposes of this analysis. As the Court stressed in *United Foods*, the question is not whether the State necessarily has a larger regulatory purpose justifying the speech, but whether there is a "cooperative marketing structure . . . to sustain an ancillary assessment" for speech. *Id.* Here, as in *United Foods*, there is no collective association to which the compelled assessments for speech is germane.

Finally, as in *Frame*, a pre-*Glickman* and pre-*United Foods* case, the Third Circuit applied the stringent associational rights standard of *Abood*, but upheld the constitutionality of the beef regulatory statute in question because of the compelling state interest involved. *Frame*, 885 F.2d at 1134. In refusing to extend *Frame*'s reach after *United Foods*, however, the same court held in *Cochran* that *United Foods* established that "promotional programs . . . seem really to be special interest legislation on behalf of the industry's interests more so than the government's[,]" and therefore constitute unconstitutional compelled speech for those dissenting from the promotions. 359 F.3d at 279.

What has survived from *Frame* is the principle that in the review of a compelled financing statute's intrusion into free speech rights, "it is relevant to consider 'the coerced nexus between the individual and the specific expressive activity.'" *Summit*, 284 F. Supp. 2d at 1360 (quoting *Frame*, 885 F.2d at 1119). Here, the nexus is

vital: unlike a situation in which money is allocated from the general treasury fund, individuals who have specifically been targeted by the speech are forced to pay for the speech. *See id.*

4. Conclusion

In sum, review under any of the available standards reveals that the compelled assessments in this case constitute an exceptional case of government intrusion on the right not to be compelled to finance speech. Indeed, the Act is designed to force one particularly disfavored group to fund speech directly undermining that group's reputation. Such state action offends the very essence of the First Amendment. *See e.g., Sons of Confederate Veterans* v. *Comm'r of the Va. Dept. of Motor Vehicles*, 305 F.3d 241, 242 (4th Cir. 2002) ("The First Amendment was not written for the vast majority. . . . It belongs to the minority of one.") (Wilkinson, C.J., concurring in denial of rehearing en banc).

Moreover, the State can provide no limiting principle, no logical reason why, if the government is free to tax and speak in this manner against this group, it cannot do so against any other disfavored group or individual. *See Summit Medical Ctr. of Alabama*, 284 F. Supp. 2d. at 1361 (refusing to apply the district court's analysis in this case, and finding that Alabama's statute forcing abortion providers to pay for the state's informational materials infringes plaintiffs' First Amendment rights). Contrary to the Attorney General's claim that the democratic process will provide a check on the use of taxes to fund such messages, by removing the burden of the cost of this program from every taxpayer except the ones targeted, this tax becomes the ultimate cheap shot, one not fully subject to the considerations that normally attend the decision to require the public at large to pay for something. *See Board of Regents* v. *Southworth*, 529 U.S. 217, 229, 146 L. Ed. 2d 193, 120 S. Ct. 1346 (2000) (traditional political controls ensure responsible

government).[17] Furthermore, the approach I take does not hinder or unduly burden the State's right or power to speak, and it does not interfere with the imposition of excise or other taxes. It simply requires the government when doing so to stay within normal channels and to avoid First Amendment violations. Under the reasoning and force of the Supreme Court's compelled speech cases, particularly the Court's recent pronouncements in United Foods, I respectfully believe the majority's argument, although well presented and articulated in their opinion, is without merit.

POSTSCRIPT

Shortly after I circulated this dissent, the Supreme Court decided *Johanns* v. *Livestock Marketing Ass'n*, 161 L. Ed. 2d 896, 544 U.S. , 125 S. Ct. 2055 (2005). For the majority of the Court, Justice Scalia wrote:

> The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First

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[17] In *Michigan Pork Producers Ass'n* v. *Veneman*, 348 F.3d 157 (6th Cir. 2003), one significant factor in the court's determination that the speech involved was not government speech was that the funding did not come from general tax revenues. *Id.* at 162. *See also Livestock Marketing Ass'n*, 335 F.3d at 720 (the flaw in the government speech argument is that the plaintiff's funds were identifiable as the funds used to finance the speech to which they objected).

> Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. The *First Amendment* does not confer a right to pay one's taxes into the general fund, because the injury of compelled funding (as opposed to the injury of compelled speech) does not stem from the Government's mode of accounting.

161 L. Ed. 2d 896 (second emphasis added) (citations omitted).

Not surprisingly, California's Attorney General suggests that this ruling "eliminates all possible doubt about the correctness" of the majority's decision. I do not agree.

The *Johanns* Court suggests, while "expressing no view on the point," that if it were to be shown that the challenged speech would "convince a reasonable factfinder" that "all . . . producers[] would be tarred with the content of each trademarked ad," an "as applied" First Amendment challenge might lie. 161 L. Ed. 2d 896. (emphasis added).

Writing separately, Justice Thomas advanced the same suggestion:

> Still, if the advertisements associated their generic pro-beef message with either the individual or organization respondents, then respondents would have a valid as-applied *First Amendment* challenge. The government may not, consistent with the *First Amendment*, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the

> speech, and whether or not the message is under the government's control. This principle follows not only from our cases establishing that the government may not compel individuals to convey messages with which they disagree. . . . but also from our expressive-associate cases, which prohibit the government from coercively associating individuals or groups with unwanted messages.

161 L. Ed. 2d 896. (emphasis added) (citations omitted).

Here, one challenged government television ad—described by my colleagues as "particularly striking"—uses a voice-over technique to speak to the public on behalf of the tobacco industry. The words put directly into the mouths of the tobacco industry disparagingly associate the appellants , and the industry with the unwanted message about which they now complain:

> *We* have to sell cigarettes to your kids. *We* need half a million new smokers a year just to stay in business so *we* advertise near schools, at candy counters. *We* lower our prices. *We* have to. It's nothing personal. You understand.

The "we" is the appellants.

If this language, albeit couched in a literary device, does not "tar all in the industry" required to pay for the ad, and if this language does not "coercively associate" and intentionally smear the appellants—all of them—with an "unwanted message" to which they object, it is hard to know what does. I respectfully disagree with the district court's preemption of this issue as a matter of law. The facts are such as to survive summary judgment and should be submitted—as suggested by the Supreme Court—to a factfinder.

At the very least, we should take our lead from our recent decision in *Charter* v. *United States Department of Agriculture*, 412 F.3d 1017 (9th Cir. 2005), recognizing the difference between that case and *Johanns* with respect to a possible attribution/association "as applied" challenge:

> In light of the Supreme Court's recognition [in *Johanns*] (without expressing a view on the issue) that an attribution claim might form the basis for an as-applied First Amendment challenge to the Act, the district court's decision must be vacated and the case remanded for further proceedings to determine, among other things, whether speech was attributed to appellants and, if so, whether such attribution can and does support a claim that the Act is unconstitutional as applied. *Id.*; *see also id.* at *9 n.* (Thomas, J., concurring) (noting that, pursuant to Federal Rule of Civil Procedure 15, "on remand respondents may be able to amend their complaint to assert an attribution claim").

There is a world of difference between what was at issue and at stake in *Johanns* and what is on our docket here. In *Johanns*, the question was whether, consistent with the First Amendment, the government could compel beef producers to fund by way of mandatory assessments a generic advertising program promoting the sale of beef. 7 U.S.C. § 2901(b). In our case, however, the purpose of the coerced speech is deliberately destructive of those forced to pay for it—not so in *Johanns*. Does this difference matter here? I believe it does. The difference is not just one of degree, but of material kind. It is one thing to promote the sale of an agricultural product; it is altogether another to attempt to destroy an entire legal industry.

I see this case as distinguishable from *Johanns*, and I continue respectfully to dissent. In my view, we should remand to the district court for reconsideration on the "as applied" issue as newly articulated in *Johanns* itself.

No. 03-16535

R.J. REYNOLDS TOBACCO COMPANY; LORILLARD TOBACCO COMPANY; R. J. REYNOLDS SMOKE SHOP, INC., *Plaintiffs-Appellants*,

v.

SANDRA SHEWRY, Director of the California Department of Health Services; DILEEP G. BAL, Acting Chief of the Tobacco Control Section of the California Department of Health Services; STATE OF CALIFORNIA, *Defendants-Appellees*.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

May 10, 2004, Argued and Submitted,
San Francisco, California
September 28, 2004, Filed

Before: Betty Binns Fletcher, Stephen Trott and Raymond C. Fisher, Circuit Judges.

FISHER, Circuit Judge:[1]

* * *

TROTT, Circuit Judge, Dissenting:[2]

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[1] Judge Fisher's opinion is reprinted *supra*, pp. 1a-30a, not including the postscript at pp. 30a-31a.

[2] Judge Trott's dissent is reprinted *supra*, pp. 32a-45a, not including the postscript at *supra*, pp. 45a-48a.

NO. CIV. S-03-659 LKK/GGH

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

R.J. REYNOLDS TOBACCO COMPANY; R.J. REYNOLDS SMOKE SHOP, INC.; and LORILLARD TOBACCO COMPANY, *Plaintiffs*,

v.

DIANA M. BONTA, Director of the California Department of Health Services; and DILEEP G. BAL, Acting Chief of the Tobacco Control Section of the California Department of Health Services, *Defendants*.

July 22, 2003, Decided

ORDER

Two tobacco companies bring suit against officials of California's Department of Health Services. They challenge the state's anti-tobacco advertisements, which are funded through a special surtax on wholesale tobacco sales. The tobacco companies claim that the surtax forces them to fund ads with which they disagree, and that this violates their right to free speech under the First Amendment. They also complain that the ads interfere with their right to trial by jury under the Seventh Amendment and unfairly stigmatize them in violation of the Due Process Clause of the Fourteenth Amendment.

The tobacco companies have moved for a preliminary injunction and the state has moved to dismiss the complaint. I decide the matter on the basis of the papers and pleadings filed herein, and after oral argument.[1]

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[1] In addition to unusually extensive and competent briefing by the parties, the court has also had the benefit of briefing by the amici American Cancer Society, (...continued)

I.

BACKGROUND[2]

A. PROPOSITION 99: THE TOBACCO TAX AND HEALTH PROTECTION ACT

In 1988, the voters of California approved Proposition 99, a statewide ballot initiative also known as the "Tobacco Tax and Health Protection Act of 1988" ("the Act").[3] Cal. Rev. & Tax Code §§ 30121-30130. The Act imposes a $ 0.25 per-pack surtax on all wholesale

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American Heart Association and American Lung Association.

[2] Because this case is before the court on defendants' motion to dismiss, the factual summary assumes the truth of all of the allegations set forth in plaintiffs' First Amended Complaint. I do not here consider the factual showing required for obtaining injunctive relief, since "the irreducible minimum" for such relief is "a fair chance of success on the merits." *Benda* v. *Grand Lodge of Int'l Machinists*, 584 F.2d 308, 314 (9th Cir. 1978). Thus, if the motion to dismiss prevails, the court will have no occasion to consider the plaintiffs' motion. I have, however, on occasion considered the contents of affidavits filed in support of plaintiffs' motion, where they tender details concerning the facts alleged in the complaint.

[3] *See generally* Michael P. Traynor and Stanton A. Glantz, *California's Tobacco Tax Initiative: The Development and Passage of Proposition* 99, 21 J. Health Pol'y & L. 543 (1996); Edith D. Balbach, et al., *The Implementation of California's Tobacco Tax Initiative: The Critical Role of Outsider Strategies in Protecting Proposition 99*, 25 J. Health Pol'y & L. 689 (2000). The history of Proposition 99 has been one of intense legislative and legal conflict. *See, e.g., American Lung Assn*, 51 Cal.App.4th 743 (Cal. Ct. App. 1996); *Kennedy Wholesale, Inc.* v. *State Bd. of Equalization*, 53 Cal.3d 245, 279 Cal. Rptr. 325, 806 P.2d 1360 (Cal. 1991).

cigarette sales in California known as the Cigarette and Tobacco Products Surtax ("the Surtax").

1. The Cigarette and Tobacco Products Surtax

The revenue collected by the Surtax is placed in the "Cigarette and Tobacco Products Surtax Fund" and may be appropriated only for the following purposes: (1) tobacco-related school and community health education programs; (2) tobacco-related disease research; (3) medical care for patients who cannot afford to pay and who lack health insurance; and (4) programs for fire prevention and environmental conservation. *Id.*, § 30122(a). In accordance with these purposes, taxes deposited into the Surtax Fund are allocated, according to specified percentages, among six separate accounts: Health Education (20%), Hospital Services (35%), Physician Services (10%), Research (5%), Public Resources (5%), and an Unallocated Account (25%), which may be made available for any of the four purposes specified above. *Id.*, § 30124(b)(1). The tobacco advertising program at issue in this case is funded through a portion of the Health Education Account, which "shall only be available for the prevention and reduction of tobacco use, primarily among children, through school and community health programs." *Id.*, § 30122(b)(1).

2. The Tobacco Control Program

In 1999, the Legislature adopted implementing legislation. Cal. Health & Safety Code §§ 104350-104485. In conjunction therewith, the Legislature made findings that smoking is detrimental to the health of Californians, that it results in huge costs to the state, and that prevention is the best means of addressing these concerns.[4] The Legislature also determined that tobacco

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[4] The legislature specifically found that:

(...continued)

use prevention and cessation is "the highest priority in disease prevention for the State of California" and made a commitment to "play a leading role in promoting a smoke-free society by the year 2000 . . . ." *Id.*, § 104350(a)(9), (10).[5]

The Legislature directed the Department of Health Services to establish "a program on tobacco use and health to reduce tobacco use in California by conducting

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> Smoking is the single most important source of preventable disease and premature death in California.
>
> Tobacco-related disease places a tremendous financial burden upon persons with the disease, their families, the health care delivery system, and society as a whole. California spends five billion six hundred million dollars ($ 5,600,000,000) a year in direct and indirect costs on smoking-related illnesses.
>
> The elimination of smoking is the number one weapon against four of the five leading causes of death in California.

Id. § 104350(a)(1), (7) & (8).

[5] While California is certainly not "smoke-free," there is substantial evidence, including published medical studies, indicating that the Proposition 99 programs, and the media campaign in particular, have been successful in achieving their goals. *See* C. Fichtenberg and S. Glantz, *Association of the California Tobacco Control Program with Declines in Cigarette Consumption and Mortality from Heart Disease*, New England Journal of Medicine 343:24, 1772-1777 (2000); M. Siegel, *Mass Media Antismoking Campaigns: A Powerful Tool for Health Promotion, Annals of Internal Medicine*, 129:2, 128-132 (1998); J.P. Pierce, et al, *Has the California Tobacco Control Program reduced smoking?*, Journal of the American Medical Ass'n, 280:10, 893-899.

health education interventions and behavior change programs at the state level, in the community, and other nonschool settings." *Id.*, § 104375(a). Pursuant to this program, known as the Tobacco Control Program, the Department is required, inter alia, to develop a media campaign directed to raising public awareness of the deleterious effects of smoking and to effect a reduction in tobacco use. *Id.*, §§ 104375(b), (c), (e)(1) & (j); 104385(a); 104400.

Approximately two-thirds of the funds in the Health Education Account are allocated to the Department of Health Services for tobacco control activities. Plaintiffs allege that the state spends approximately $ 25 million annually on the challenged advertisements. Complaint at P22.

B. THE CHALLENGED ADVERTISEMENTS

California's anti-tobacco media campaign consists of radio, television, billboard and print advertising. Complaint at P14. According to plaintiffs, the ads consistently portray smoking as dangerous and undesirable and the tobacco industry and its executives as deceptive. *Id.* at PP17, 19. In several of the television ads, actors playing tobacco executives are shown discussing how to lure more people into smoking or are portrayed as being elusive about smoking's health effects. *See* Declaration of Todd Thompson ("Thompson Decl."), Exh. L. These ads do not contain disclaimers explaining that the people shown are actors rather than actual tobacco company employees. Complaint at P18.

A recent round of television commercials features an actor playing a public relations executive for the fictional cigarette brand "Hampton," detailing for viewers his unseemly methods for getting people to start smoking. Thompson Decl., Exh. L. The ads end with the tagline, "Do You Smell Smoke?," *id.*, implicitly referencing both cigarette smoke and a smoke-and-mirrors marketing

strategy. Another ad portrays tobacco executives discussing how to replace a customer base that is dying at the rate of 1,100 users a day. *Id.* Some of the ads end with images of mock warning labels such as: "WARNING: The tobacco industry is not your friend."; or "WARNING: Some people will say anything to sell cigarettes." *Id.*

Several spots suggest that tobacco companies aggressively market to children. *Id.* In one particularly striking television ad entitled "Rain," children in a schoolyard are shown looking up while cigarettes rain down on them from the sky. Complaint at P19. A voice-over states "We have to sell cigarettes to your kids. We need half a million new smokers a year just to stay in business. So we advertise near schools, at candy counters. We lower our prices. We have to. It's nothing personal. You understand." Thompson Decl., Exhibit L. At the conclusion, the narrator says, "The tobacco industry: how low will they go to make a profit?" *Id.*

Each of the challenged advertisements is identified as "Sponsored by the California Department of Health Services." *Id.*

C. THE PARTIES

Plaintiffs are R.J. Reynolds Tobacco Company, its subsidiary, R.J. Reynolds Smoke Shop, Inc., and Lorillard Tobacco Company. Both R.J. Reynolds and Lorillard manufacture and sell cigarettes in California. All three corporations have their principal place of business in North Carolina and are incorporated in Delaware.

Lorillard and R.J. Reynolds allege that their business in California requires them to pay the Cigarette and Tobacco Products Surtax; R.J. Reynolds does not pay the Surtax directly but pays it through the Smoke Shop subsidiary. Because the Surtax is imposed on "distributors" of cigarettes, most Surtax payments are not made by the cigarette manufacturers themselves, but by cigarette wholesalers. Because plaintiffs also sell or

provide small quantities of cigarettes directly to smokers in California, however, they claim that they have and will in the future be required to pay the Surtax. *See* Declaration of Steven F. Gentry ("Gentry Decl.") PP2, 4. Plaintiffs state that their combined payments of the Tobacco Products Surtax in 2002 were in excess of $ 14,000. Gentry Decl. P4. Thus, plaintiffs allege that they collectively contributed approximately $ 2,800 of the $ 25 million spent on the challenged ads.

The defendants are Diana M. Bonta, Director of the California Department of Health Services, and Dileep G. Bal, Acting Chief of the Tobacco Control Section of DHS. The Complaint alleges that "Bonta is the highest-ranking official of DHS and, accordingly, is ultimately responsible for the advertising challenged in this action." Complaint at 2, P4. Defendant "Bal is directly responsible for the design, approval and distribution of the advertising challenged in this action." *Id.* at 2, P5.

D. PLAINTIFFS' ALLEGATIONS

Plaintiffs bring five causes of action. First, they allege that the use of the Surtax for funding anti-industry ads violates the right of free speech secured to them by the First Amendment. Second, they allege an identical claim under the free speech clause of Article I, section 2 of the California Constitution. Third, plaintiffs allege that the "anti-industry" ads stigmatize them, publicly disparage their reputation and character, and prejudice potential jurors with respect to the facts that underlie the sort of civil lawsuits that are frequently brought against them in California. They allege that the distribution of the advertisements thus constitutes a denial of due process, in that the state has publicly stigmatized them and denied them the right to a fair and impartial jury in California, in violation of both the Fourteenth and Seventh Amendments. Fourth, plaintiffs allege that the distribution of the program's anti-industry ads constitutes a denial of their right to a fair and impartial jury under

the Seventh Amendment. Fifth, plaintiffs bring a claim for declaratory relief, seeking a judicial declaration that the distribution of the anti-industry ads violates their constitutional rights because it (1) constitutes compelled speech with which they disagree; (2) constitutes disparaging speech which was published without affording them prior notice and hearing; and (3) has the potential to prejudice current and future California jurors with respect to matters at issue in pending litigation. Plaintiffs also seek an injunction barring defendants from using funds raised by the Surtax to distribute any advertising that "attacks, ridicules, vilifies, or otherwise criticizes or comments negatively upon the conduct or speech of the 'tobacco industry,' or of Plaintiffs." Complaint at 14 P1.

II. STANDARDS UNDER FED. R. CIV. P. 12(b) (6)

On a motion to dismiss, the allegations of the complaint must be accepted as true. *See Cruz* v. *Beto*, 405 U.S. 319, 322, 31 L. Ed. 2d 263, 92 S. Ct. 1079 (1972). The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *See Retail Clerks Intern. Ass'n, Local 1625, AFL-CIO* v. *Schermerhorn*, 373 U.S. 746, 753 n. 6, 10 L. Ed. 2d 678, 83 S. Ct. 1461 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. See *id.*; *see also Wheeldin* v. *Wheeler*, 373 U.S. 647, 648, 10 L. Ed. 2d 605, 83 S. Ct. 1441 (1963) (inferring fact from allegations of complaint).

In general, the complaint is construed favorably to the pleader. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). So construed, the court may not dismiss the complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. *See Hishon* v. *King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229

(1984) (citing *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). In spite of the deference the court is bound to pay to the plaintiff's allegations, however, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged, or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983).

III. STANDING

The defendants' first defense is that the plaintiffs lack standing. As I now explain, plaintiffs' constitutional claims are such that this suit comes close to being "in the class of those cases where standing and the merits are inextricably intertwined." *City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 243 n.5, 77 L. Ed. 2d 605, 103 S. Ct. 2979 (1983).

"To satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of Earth, Inc.* v. *Laidlaw Environmental Services*, 528 U.S. 167, 180-181, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000). These requirements together constitute the "irreducible constitutional minimum" of standing. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130, (1992). The party invoking federal jurisdiction bears the burden of establishing these elements. *See FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 231, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace

those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (internal citations and quotation marks omitted).

E. INJURY-IN-FACT

Plaintiffs claim they are injured because they are compelled to fund speech with which they disagree and because the airing of the challenged advertisements injures their reputation. Defendants contend that plaintiffs lack the requisite injury because their stake as taxpayers is too generalized and indirect to confer standing and because the compelled-speech claim fails as a matter of law. Defendants also argue that plaintiffs cannot premise standing on alleged reputational injury because any such injury is not sufficiently individualized.

Generally, suits premised solely on state or federal taxpayer status are not cognizable in the federal courts because a taxpayer's "interest in the moneys of the Treasury . . . is shared with millions of others, is comparatively minute and indeterminable; and the effect upon future taxation, of any payments out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for [judicial intervention.]" *ASARCO, Inc.* v. *Kadish*, 490 U.S. 605, 613, 104 L. Ed. 2d 696, 109 S. Ct. 2037 (1989) (quoting *Massachusetts* v. *Mellon*, 262 U.S. 447, 487, 67 L. Ed. 1078, 43 S. Ct. 597 (1923)). The Supreme Court, however, has indicated that standing may exist where the "peculiar relation" of the taxpayer and the taxing entity or program makes the taxpayer's interest in the application of revenues "direct and immediate." *Id.*

In the matter-at-bar, it appears that plaintiffs have such a "direct and immediate" interest. The Surtax in question is levied only on tobacco wholesalers and manufacturers, for purposes directly related to their business, so that the interest at issue is not "shared with millions of others." Both the Supreme Court and the

Ninth Circuit have indicated that standing is proper where, as here, a tax is challenged by members of a small, discrete group on whom the tax is imposed. *See Bacchus Imports* v. *Dias*, 468 U.S. 263, 267, 82 L. Ed. 2d 200, 104 S. Ct. 3049 (1984) (liquor wholesalers had standing to challenge constitutionality of liquor excise tax); *United States* v. *Butler*, 297 U.S. 1, 61, 80 L. Ed. 477, 56 S. Ct. 312 (1963) (farmers had standing to challenge agricultural processing taxes); *ACF Indus., Inc.* v. *California State Bd. of Equalization*, 42 F.3d 1286, 1291 (9th Cir. 1994) (holding that where a state "directly assesses [plaintiffs] with the challenged tax . . . the standing issue is not complex.").[6]

The plaintiffs, however, are not challenging the tax itself but the government's use of tax dollars. The question is whether the distinction makes a difference; I conclude that it does not. Standing in the present context turns on whether the plaintiffs are members of a small, discrete group on whom the tax is imposed and whether the tax is put to uses directly affecting the plaintiffs. Under this standard, there appears to be no meaningful distinction between attacking the lawfulness of collecting the tax, as contrasted with the lawfulness of the use to which the tax is put. As I now explain, the issue here is similar to taxpayer standing in another First Amendment context.

In Establishment Clause cases, rather than requiring a "direct injury," courts require a plaintiff to demonstrate

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[6] The Tax Injunction Act, 28 U.S.C. § 1343, which creates a jurisdictional bar to cases in federal court that seek to enjoin or restrain the collection of taxes under state law, is inapplicable here because plaintiffs seek only to enjoin anti-tobacco advertising funded by the tobacco Surtax, not the collection of the Surtax itself. *See Hoohuli* v. *Ariyoshi*, 741 F.2d 1169, 1177 (9th Cir. 1984).

a logical link between his taxpayer status and the challenged legislative enactment, and a nexus between his taxpayer status and the precise nature of the alleged constitutional infringement. *Flast* v. *Cohen*, 392 U.S. 83, 102-03, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968); *see also Doe* v. *Madison Sch. Dist.*, 177 F.3d 789 (9th Cir. 1999) (to challenge the constitutionality of a state statute on the basis of the Establishment Clause, a party must show that "tax revenues are expended on the disputed practice."). In *Flast*, the decision rested in part on the fact that the Establishment Clause is a specific limit on the power of Congress to tax and spend. 392 U.S. at 104.[7] If plaintiffs' theory on the merits of their First Amendment claim is correct - i.e. that the *Abood* line of compelled expressive association cases may be extended to cover tax-funded government speech - then it would appear to follow that the Free Speech Clause would also satisfy *Flast*, since in that limited context the Free Speech Clause would also operate as a limit on the state's power to tax and spend.

Similarly, plaintiff's alleged reputational injuries, on which their Seventh Amendment and Due Process claims depend, are not as generalized as defendants contend. In arguing to the contrary, defendants rely on *Allen* v. *Wright*, 468 U.S. 737, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984), a case in which the Supreme Court held that the alleged harm of racial stigmatization was not sufficiently individualized to confer standing on parents of black children attending public schools who challenged IRS policies regarding the tax-exempt status of racially-discriminatory private schools. The Court explained that

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[7] The Court has never declared that the Establishment Clause is the only constitutional provision that satisfies the Flast test for taxpayer standing; it has, however, never found any other constitutional provision that satisfies the test.

"if the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school." *Id.* at 755-56 (internal citations and quotation marks omitted). Whatever the strength of *Allen*'s logic,[8] the situation here is entirely different. The stigma and reputational harm allegedly caused by the challenged advertisements affects only tobacco wholesalers and a handful of large tobacco manufacturers that sell their cigarettes to Californians. Thus, plaintiffs have sufficiently alleged injury.

F. CAUSATION

In arguing that plaintiffs have failed to demonstrate the requisite causation, defendants again raise arguments that are more properly directed to the merits. Defendants' causation argument is particularly directed to the merits of plaintiffs' Seventh Amendment claim; they claim that any impact on jury trials caused by the challenged program is entirely speculative. For purposes of the standing inquiry, at least on a motion to dismiss, plaintiffs would appear to have satisfactorily alleged that California's advertising campaign, which has the purpose of changing people's attitudes about tobacco use and maligning the character of the tobacco industry, actually has that effect. These allegations are sufficient to show

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[8] I note in passing that the observation is less than perfectly persuasive. African-Americans are a distinct group, and if indeed the government is discriminating against the members of the group in its use of taxes, it is not clear why any member of the group should not have standing. *See generally* Gene R. Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. Pa. L. Rev. 635, 641-49 (1985).

that the reputational harm alleged flows from the advertisements.

G. REDRESSABILITY

Finally, defendants argue that plaintiffs' claims, even if sustained, would not be redressable. As defendants correctly point out, the ordinary remedy in compelled funding for speech cases is a refund of the money used to fund the objected-to speech. Here, however, plaintiffs do not seek a refund or an order enjoining the state from collecting the Surtax and, in any event, such a remedy would be barred by the Tax Injunction Act, 28 U.S.C. § 1343. The remedy that plaintiffs do seek, however, an injunction prohibiting the defendants from airing the objectionable advertisements, is not barred by statute and has in fact been adopted by at least one court in a compelled speech case. *See Pelts & Skins LLC* v. *Jenkins*, 259 F. Supp. 2d 482, No. 02-384, 2003 WL 1984368 (M.D. La. Apr. 24, 2003) (enjoining use of funds in the Louisiana Fur and Alligator Public Education Marketing Fund for the purpose of generic alligator marketing). Whether or not the relevant law dictates such a remedy is a separate matter. Because there appears to be no bar to the remedy plaintiffs seek, they have alleged redressability for purposes of standing.

Given all the above, the court concludes that plaintiffs' allegations satisfy Article III's "case or controversy" requirement. I now turn to the merits.

IV. THE FIRST AMENDMENT

The tobacco companies argue that California's use of the Proposition 99 Surtax to fund the challenged advertising effectively compels them to fund speech with which they disagree. They assert that such compulsion

violates their rights under the First Amendment.[9] They do not question the states's right to convey information to its citizens about the health risks of smoking. Rather, they object to advertising that assails the character, motives and practices of the tobacco industry and seek to enjoin the state from airing ads fitting that description.

Defendants and amici contend that the advertising is speech by the government on a matter of urgent importance to the public health of its citizens, and as with any other speech by the government, the advertising is necessarily funded by tax revenues. Under the "government speech" doctrine, they argue, taxpayers do not have a right to object to such activity under the First Amendment. Before turning to the government speech doctrine, I begin by addressing the compelled speech cases on which plaintiffs rely.

B. WHETHER THE DHS ADVERTISEMENTS ARE IMPERMISSIBLE COMPELLED SPEECH

Cases involving "compelled speech" fall into two distinct categories. The first line of authority, involving situations where the government directly compels citizens to engage in speech activity, is plainly inapplicable here. The challenged program does not, for instance, require the tobacco companies to repeat an objectionable message out of their own mouths, *see West Virginia Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 632, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943) (government may not compel children, contrary to their conscience, to salute the American flag), or force

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[9] While there is no doubt that corporations enjoy the protection of the First Amendment, *Hague* v. *CIO*, 307 U.S. 496, 83 L. Ed. 1423, 59 S. Ct. 954 (1939), the Court has not "decided whether the First Amendment's protection of corporate speech is coextensive with the protection it affords to individuals." *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334, 353, 131 L. Ed. 2d 426, 115 S. Ct. 1511 (1995).

them to use their own property to convey an antagonistic ideological message, *see Wooley* v. *Maynard*, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977) (government may not compel motorists, contrary to their conscience, to display license plates bearing the motto "Live Free or Die").[10]

Instead, plaintiffs rely on a second line of cases in which the Supreme Court has scrutinized programs that compel people to join and contribute to groups or associations whose speech they find objectionable. *See Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977); *Keller* v. *State Bar of California*, 496 U.S. 1, 110 L. Ed. 2d 1, 110 S. Ct. 2228 (1990); *Glickman* v. *Wileman Brothers*, 521 U.S. 457, 138 L. Ed. 2d 585, 117 S. Ct. 2130 (1997); *United States* v. *United Foods*, 533 U.S. 405, 413, 150 L. Ed. 2d 438, 121 S. Ct. 2334 (2001) ("The mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.").[11]

As I explain below, plaintiffs' reliance on these cases is unwarranted. Neither the holdings nor the reasoning in these cases suggest that government's decision to levy a targeted tax used to fund its own speech runs afoul of the

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[10] While the plaintiffs object to the use of "their" tax money to fund the advertisements, they do not contend (nor could they, given the undisputed propriety of imposing the tax), that funds so raised are not the State's at the time the funds are expended.

[11] I have previously described this line of cases as articulating a "doctrine of unwilling allegiance." *Prescott* v. *County of El Dorado*, 915 F. Supp. 1080, 1085 (E.D. Cal. 1996). I have also noted my sense that this line of cases does not fit easily within the conventional pattern of First Amendment issues. *Id.* at 1085 n. 5.

First Amendment; moreover, so far as this court can determine, no lower court, state or federal, has found otherwise. This is not surprising. *Cf. NAACP* v. *Hunt*, 891 F.2d 1555, 1556 (11th Cir. 1990) ("*Abood* has never been applied to the government, however; if it were, taxation would become impossible."). Put directly, the courts have consistently drawn a line between the compelled payment of funds to support private expressive association, which may be unconstitutional "compelled speech," and the compelled payment of taxes and other exactions to fund speech by the government itself. Questions arising under the latter scenario must be considered under the government speech doctrine. The Supreme Court cases on which plaintiffs principally rely serve to illustrate this distinction.

1. *Abood* and *Keller*

Chronologically, the first such case is *Abood*.[12] There, public school teachers in Detroit challenged the "agency shop" provisions of their collective bargaining agreement, which required every teacher represented by the teachers' union, regardless of whether the teacher was a member, to pay a service fee equal to union dues. 431 U.S. at 210. The Court held that although being required to help

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[12] In their opening brief, plaintiffs propose that "the compelled speech doctrine was first applied in *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 768-69, 6 L. Ed. 2d 1141, 81 S. Ct. 1784 (1961), in which the Court held that when employees are required by law to pay dues to a labor union, the union cannot use those dues to support political activities the employees oppose." Pl's MPA in Supp. of Prelim. Inj. at 13. While this statement of the holding in Street is accurate, that holding was dictated by the Court's interpretation of the Railway Labor Act, not by a conclusion that the challenged policy violated the First Amendment. 367 U.S. at 768. In any event, *Abood* made clear that the First Amendment dictates the same result.

finance the union "might well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so," any such interference was constitutionally justified by the important contribution of agency shops to the system of labor relations established by Congress. *Id.* at 222-232. When it came to the union's use of service fees for political activities unrelated to collective bargaining, however, the Court reached a different conclusion; using the fees for such purposes, the Court held, constituted impermissible compelled speech.

This holding was dictated by two well-established principles: first, that "the freedom of an individual to associate for the purposes of advancing beliefs and ideas is protected" by the First . . . Amendment, *id.* at 233, and second, that "a government may not require an individual to relinquish rights guaranteed to him by the First Amendment as a condition of public employment." *Id.* at 234. It followed, the Court held, that the First Amendment prohibited the union and the school board from requiring any teacher, as a condition of employment, to contribute to the advancement of ideological causes with which the teacher disagreed and which were not "germane" to the union's duties as a collective-bargaining representative. *Id.* at 235-35. The Court carefully limited the prohibition to activity unrelated to the union's core associational purposes, distinguishing between collective bargaining activities, for which otherwise impermissible compelled association was justified, and other purposes, for which no such justification existed.

In a concurring opinion, Justice Powell emphasized that the obligation of citizens to contribute taxes to the government, whether or not they agree with how the money is spent, is not an obligation that may be excused by the freedom of speech or association. In doing so, he highlighted the critical distinction between expressive association and government speech:

> Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

Id. at 259 n.13 (Powell, J., concurring).

In *Keller*, the Court expanded on *Abood*'s compelled speech analysis and, more importantly for our purposes, on the distinction in Justice Powell's footnote. The *Keller* Court held that compelling objecting attorneys to pay dues to the California State Bar, to the extent that such dues were used to finance political or ideological activities not germane to the state bar's function, was invalid. The California Supreme Court decision under review, relying on the government speech doctrine, had rejected the attorneys' First Amendment challenge because it determined that the Bar was a government agency. In ruling against the Bar, the U.S. Supreme Court did not reject the state court's rationale. On the contrary, the Court embraced the distinction between government speech and compelled speech and merely rejected the premise that the State Bar was speaking on behalf of the

government.[13] Indeed, the Court quoted the California court's broad articulation of the doctrine, along with Justice Powell's *Abood* concurrence, apparently with approval:

> If the bar is considered a government agency, then the distinction between revenue derived from mandatory dues and revenue from other sources is immaterial. A government agency may use unrestricted revenue, whether derived from taxes, dues, fees, tolls, tuition, donation, or other sources, for any purposes within its authority.

Keller, 496 U.S. at 10 (quoting *Keller* v. *State Bar*, 47 Cal.3d 1152, 1167, 255 Cal. Rptr. 542, 767 P.2d 1020 (1989)) (emphasis added).

The High Court, however, concluded that the Bar's primary purpose was the representation of its members, and thus it was functionally equivalent to the union in *Abood* and "a good deal different from most other entities that would be regarded in common parlance as 'government agencies.'" 496 U.S. at 11. The Court clearly articulated the difference between the compelled speech at issue there and government speech, holding that "the very specialized characteristics" of the Bar distinguished its role from that of government officials, who "are expected as part of the democratic process to represent

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[13] The Court acknowledged that "the Supreme Court of California is the final authority on the 'governmental status' of the State Bar of California for purposes of state law" but held that the state court's "determination that the respondent is a 'government agency' . . . is not binding on us when such a determination is essential to the decision of a federal question." 496 U.S. at 10. *But see McMillian* v. *Monroe County, Alabama*, 520 U.S. 781, 786, 138 L. Ed. 2d 1, 117 S. Ct. 1734 (1997).

and espouse the views of a majority of their constituents." *Id.*

As in *Abood*, the Court found that compelled association with the Bar was permissible to the extent that it furthered the Bar's core purposes. Just as the "agency shop" arrangement was designed to prevent free-riders (people who benefit from collective bargaining but don't pay dues), it was appropriate that "the lawyers who derive benefit" from the Bar's activities, "should be called upon to pay a fair share of the cost of professional involvement in this effort." *Id.* at 11. Again, as in *Abood*, to the extent that the political and ideological activities funded were not germane to that purpose, compelled association could not be justified.

2. *Glickman* and *United Foods*

Plaintiffs place greater emphasis on a pair of more recent Supreme Court decisions, *Glickman* and *United Foods*, both of which discussed the application of *Abood* and *Keller* to programs that compel agricultural producers to contribute to trade groups for the purposes of generic industry advertising. Neither of these cases, however, upset the Court's distinction between government speech and impermissible compelled speech.

In *Glickman*, the Court rejected a challenge by growers and processors of California tree fruits, who were required by marketing orders promulgated by the Secretary of Agriculture (pursuant to the Agricultural Marketing Agreement Act) to pay assessments to a Nectarine Administrative Committee and Peach Commodity Committee. Those committees, in turn, used the money to pay for generic industry advertising.

The Court began its inquiry by stating that "*Abood*, and the cases that follow it, did not announce a broad First Amendment right not to be compelled to provide financial support for any organization that conducts expressive activities. Rather, *Abood* merely recognized a

First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's freedom of belief." 521 U.S. at 471. The *Glickman* Court held that the assessments at issue did not violate the First Amendment because "(1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities." *Id.* at 473. Thus, as in *Abood* and *Keller*, the Court adhered to its germaneness test, holding that speech that is germane to broader, legitimate purposes of association will be upheld. As Justice Souter noted, the Court was not required to discuss the government speech doctrine because the Secretary of Agriculture expressly waived the argument that the advertisements at issue constituted government speech. *Id.* at 483 n.2 (Souter, J., dissenting).

Only four years later, in *United Foods*, the Court invalidated a similar federal assessment program imposed on mushroom growers. The Court distinguished the fruit-tree program upheld in Glickman by explaining that "in Glickman, the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme." *United Foods*, 533 U.S. at 415.[14]

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[14] Based on this distinction, defendants contend that, even if the speech at issue here were not government speech, the use of Tobacco Products Surtax funds for advertising would nevertheless survive constitutional scrutiny because the ads are just one part of a comprehensive regulatory scheme aimed at reducing the harmful effects of tobacco use. Because the vast majority of the funds raised by the Surtax are used to fund activities other than speech, such as health care, research and other programs, they maintain that this case would be closer to (...continued)

Notably, the Court again did not reach the question of government speech. Because the issue had not been addressed in the courts below, the Court declined to consider the argument. The Court suggested, however, that the government would have to establish that it exercised more than pro forma control over the speech for it "to be labeled, and sustained, as government speech."[15]

Glickman than *United Foods*. Assuming government speech were not involved, defendants' argument has considerable weight, since speech appears not to be "the principal object of the regulatory scheme." *United Foods*, 533 U.S. at 415; *see Delano Farms Co.* v. *California Table Grape Comm'n*, 318 F.3d 895, 898 (2003) (applying *Glickman-United Foods* distinction to grape advertising program; explaining that the distinction turns on the comprehensiveness of the regulatory scheme). Since the speech involved here is government speech, neither *Glickman* nor *United Foods* control and there is therefore no need to further address the issue.

[15] The Court explained:

> The Government's failure to raise its argument in the Court of Appeals deprived respondent of the ability to address significant matters that might have been difficult points for the government. For example, although the Government asserts that the advertising is subject to approval by the Secretary of Agriculture, respondent claims that the approval is pro forma. This and other difficult issues would have to be addressed were the program to be labeled, and sustained, as government speech.

533 U.S. at 417.

Unlike the mushroom assessment program invalidated in *United Foods*, there is no question that the DHS officials named as the defendants here exercise much more than pro forma authority over the challenged advertising, and plaintiffs do not suggest otherwise. The parties do not dispute that the defendants are actually responsible for the speech conveyed. Thus, there are no "difficult issues [that] would have to be addressed [before] the program [is] labeled, and sustained, as government speech." 533 U.S. at 417.

In *Board of Regents of the Univ. of Wisconsin* v. *Southworth*, 529 U.S. 217, 146 L. Ed. 2d 193, 120 S. Ct. 1346 (2000), as in *United Foods*, the Court made clear that when the question of whether government speech is involved is properly raised, that question presents a threshold issue in a compelled speech challenge under the *Abood* line of cases. Only after first concluding that "the case we decide here . . . does not raise the issue of the government's right, or to be more specific, the state-controlled University's right, to use its own funds to advance a particular message," 120 S. Ct. at 1354, did the Court move on to the compelled speech inquiry, *id.* ("the *Abood* and *Keller* cases, then, provide the beginning point of our analysis.").[16]

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[16] The Ninth Circuit authority on which plaintiffs rely does not suggest another mode of analysis. Plaintiffs rely on *Cal-Almond, Inc.* v. *USDA*, 14 F.3d 429 (9th Cir. 1993) ("Cal-Almond I"), and go so far as to suggest that the case "controls" the outcome here. *See, e.g.*, Pl's Reply Br. at 8-10. But as *Cal-Almond*'s procedural history makes clear, and as the Ninth Circuit has explained, that decision's compelled speech analysis is no longer good law. *See Cal-Almond* v. *USDA*, 192 F.3d 1272, 1277 (1999) ("Cal Almond IV") ("In light of the Supreme Court's remand in *Cal-Almond II* and our subsequent remand for dismissal (...continued)

In the wake of *United Foods*, federal courts addressing challenges of mandatory assessments for generic agricultural advertising programs have uniformly addressed government speech as a threshold issue before turning to the compelled speech inquiry. *See, e.g.*, *Pelts & Skins, LLC* v. *Jenkins*, No. Civ.A.02-CV 384, 259 F. Supp.2d 482, 2003 WL 1984368, at *6 (M.D. La. Apr. 24, 2003) (challenge of mandatory assessments used to fund generic advertising of alligator products; reasoning that "because the generic advertising here involved is not government speech, plaintiff is free to challenge such advertising on First Amendment grounds"); *In re Washington State Apple Comm'n*, 257 F. Supp. 2d 1290, 1305 (challenge of mandatory assessments used to fund generic advertising of apples; reaching compelled speech issue only after holding that "the Commission's activities are not protected by the government speech doctrine"); *Michigan Pork Producers* v. *Campaign for Family Farms*, 229 F. Supp.2d 772, 785-89 (W.D. Mich. 2002) (challenge of mandatory assessments for generic advertising of pork products; reasoning that "though the Secretary is integrally involved with the workings of the Pork Board, this involvement does not translate the advertising and marketing in question into 'government speech'");

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in *Cal-Almond III*, *Cal-Almond I* has been implicitly overruled."). The decision's holdings on other issues, however, retain precedential value. *See, e.g.*, *NRDC* v. *Evans*, 316 F.3d 904, 906, 911-12 (9th Cir. 2003) (relying on *Cal-Almond I* for an administrative law issue; "The outcome here follows *Cal-Almond*.").

Nor does the Ninth Circuit's recent decision in *Delano Farms* help plaintiffs. Delano Farms simply offers a straightforward application of *United Foods* to a grape advertising program similar to the mushroom program considered by the Supreme Court.

Livestock Mktg. Ass'n v. *United States Dep't of Agric.*, 2002 DSD 18, 207 F. Supp.2d 992 (D.S.D. 2002) ("The generic advertising program funded by the beef checkoff is not government speech and is therefore not excepted from First Amendment challenge"); *Charter* v. *USDA*, 230 F. Supp.2d 1121 (D. Mont. 2002) (rejecting challenge to a program of mandatory assessments for beef industry advertising on the grounds that the advertising at issue was government speech and that *United Foods*, therefore, did not control).

A recent decision by the Eighth Circuit offers a concise explanation of the difference between compelled speech and government speech:

> Unlike [a case] where plaintiffs challenge [] a decision concerning the content of government speech, appellees in the present case are challenging the government's authority to compel them to support speech with which they personally disagree; such compulsion is a form of government interference with private speech. The two categories of First Amendment cases - government speech cases and compelled speech cases - are fundamentally different.

Livestock Mktg. Ass'n v. *USDA*, 2003 U.S. App. LEXIS 13630, Nos. 02-2769/283, F.3d , 2003 WL 21523837 (July 8, 2003) at *8. (emphasis added). Put simply, while the cases on which plaintiffs rely fall in the compelled speech line, this case involves government speech. Plaintiffs are not seeking to prevent coerced participation in private expressive association; rather, they are attempting to exercise a taxpayer's veto over speech by the government itself. As I explain below, that attempt founders on the shoals of the "government speech" doctrine.

C. WHETHER THE DHS ADVERTISEMENTS ARE GOVERNMENT SPEECH

The determination as to whether speech is properly characterized as government speech or private speech turns entirely on "who is responsible for the speech." *Downs* v. *Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1011-12 (9th Cir. 2000), cert. denied, 532 U.S. 994, 149 L. Ed. 2d 636, 121 S. Ct. 1653 (2001). In other words, the inquiry rests on the level of control and authority that the government exercises over the message conveyed. *See id.* at 1009-1012 (content of public school bulletin boards was government speech because boards were used to express school policy, access was limited to faculty and staff, and postings were subject to the oversight of school principals); *see also Knights of the Ku Klux Klan* v. *Curators of the Univ. of Mo.*, 203 F.3d 1085, (8th Cir.), *cert. denied*, 531 U.S. 814, 148 L. Ed. 2d 18, 121 S. Ct. 49 (2000) (underwriting acknowledgments by state university-run radio station constituted government speech because, inter alia, radio station's staff members composed, edited and reviewed acknowledgment scripts prior to broadcast and because the university was ultimately responsible for all broadcast materials).

While in some cases the distinction between government speech and compelled allegiance may present "difficult issues," *United Foods*, 533 U.S. at 417, the analysis here is straightforward. The advertisements at issue here are controlled by government officials, who are ultimately responsible for their content.[17] *See* Complaint

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[17] In contrast, the "speakers" in the compelled allegiance cases cited by the plaintiffs were the Mushroom Council (*United Foods*), the Nectarine Administrative Committee and Peach Commodity Committee (*Glickman*), the State Bar of California (Keller), the Detroit Federation of Teachers (*Abood*), the California Table Grape Commission (*Delano Farms*), California Almond Board (*Cal-Almond I*), and the Cattleman's Beef (...continued)

at 2, P4 (alleging that defendant Bonta "is ultimately responsible for the advertising challenged in this action"); *id.* at 2, P5 (alleging that defendant Bal "is directly responsible for the design, approval and distribution of the advertising challenged in this action."). Indeed, the Department of Health Services is specifically directed by statute to produce and implement a "media campaign . . . stressing the importance of both preventing the initiation of tobacco use and quitting smoking . . . based on professional market-research and surveys necessary to determine the most effective method of diminishing tobacco use among specific target populations." Cal. Health & Saf. Code § 104375(e)(1).[18]

If the determination turned on the attribution of the speech rather than control of the message, the result here would be the same. Unlike the *Glickman-United Foods* line of cases where a discrete group is compelled to fund the "dissemination of a particular message identified with that group," *Cal-Almond I*, 14 F.3d at 435 (emphasis added), the tobacco advertisements are clearly identified as coming from the California Department of Health Services, i.e. the state government. *Compare* Thompson

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Promotion and Research Board (*United States* v. *Frame*, 885 F.2d 1119 (3rd Cir. 1989)).

[18] The same statute also provides that "no media campaign funded pursuant to this article shall feature in any manner the image or voice of any elected public official or candidate for elected office, or directly represent the views of any elected public official or candidate for elected office." Cal. Health & Safety Code § 104375(e)(2). This provision in no way undermines the fact the government is directly responsible for the ads; on the contrary, it ensures that the position being advanced is that of the government itself, not of political candidates. The provision is clearly designed to ensure that tax money is not used to fund partisan political speech or electioneering.

Decl., Exhibit L (challenged advertisements are all clearly identified as "Sponsored by the California Department of Health Services") *with Frame*, 885 F.2d at 1133 n.11 (beef checkoff advertising contains "no mention of the Secretary or the Department of Agriculture, thus failing to convey that the advertisements are funded through a government program.").[19] Even if the ads were not so clearly identified, no one could possibly confuse them for the tobacco companies' own speech. This fact of attribution, together with the actual responsibility of government officials for the ads, demonstrates that the speech at issue here is government speech.

D. THE GOVERNMENT SPEECH DOCTRINE

In discussing the latitude afforded to the government under the "government speech" doctrine, courts have generally spoken in terms that are remarkably open-ended. Given the purposes of the doctrine, a broad opportunity for government speech is not entirely inappropriate. I cannot acknowledge the doctrine,

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[19] With near unanimity, courts that have squarely addressed the issue have found that generic agricultural assessment programs, which fund speech by non-governmental or quasi-governmental industry groups for the collective benefit of contributing producers, are not governmental speech. The "Beef Checkoff" program appears to be the only such program on which courts have been somewhat divided. *Compare Livestock Marketing*, 2003 U.S. App. LEXIS 13630, 2003 WL 21523837 (holding that beef program is not government speech; striking down program as "in all material respects, identical to the mushroom checkoff program at issue in *United Foods*"); *Goetz* v. *Glickman*, 149 F.3d 1131, 1138-39 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102, 142 L. Ed. 2d 769, 119 S. Ct. 867 (1999) (upholding beef program under *Glickman*); *United States* v. *Frame*, 885 F.3d 1119 (3d Cir. 1989) (holding beef program is not government speech and passes muster under *Central Hudson*) *with Charter* (beef checkoff is government speech and thus United Foods does not control).

however, without also expressing my serious reservations about its undefined and open-ended nature. I begin by explaining why the government speech doctrine compels the conclusion that the challenged program must be upheld. I then turn to the potential limits on the doctrine in order to underscore that government speech, like government action, is not without constitutional limits. Nonetheless, I conclude that none of the present limitations on government speech support plaintiffs' claims.

I begin this portion of the analysis by noting that the government does not enjoy protection for its speech under the First Amendment. *See Columbia Broad. Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 139, 36 L. Ed. 2d 772, 93 S. Ct. 2080 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from government interference; it confers no analogous protection on the government"); *id.* at 139, n.7 ("'The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents.'" (quoting T. Emerson, The System of Freedom of Expression 700 (1970)).

Nonetheless, "the government speech doctrine has firm roots in our system of jurisprudence." *Livestock Marketing*, 2003 U.S. App. LEXIS 13630, 2003 WL 21523837, at *8. The Supreme Court has said, in dicta, that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes." *Rosenberger* v. *Rector and Visitors of the Univ. of Va.*, 515 U.S. at 833 (1995); *see Columbia Broad. Sys.*, 412 U.S. at 139 & n.7 (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression."). In equally broad language, the Ninth Circuit has said that when the government is the speaker, "its control of its own speech is not subject to the constraints of constitutional

safeguards and forum analysis, but instead is measured by practical considerations applicable to any individuals' choice of how to convey oneself: among other things, content, timing and purpose." *Downs*, 228 F.3d at 1013.[20]

It has been said that the government speech doctrine is a necessary implication of our system of government:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

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[20] Implicit in the government speech cases is a suggestion that government is just one more participant in the marketplace of ideas. Such a notion appears to this court to be naive. It ignores the force of government, as compared to private speech, and, even more importantly, the access that government speech has to free media, much less the paid media at issue here.

Keller, 496 U.S. at 12-13.[21] While plaintiffs' reaction to California's advertisements is quite understandable, the government speech doctrine teaches that the remedy for their assertion of harm is "political rather than judicial." *Griffin* v. *Secretary of Veteran Affairs*, 288 F.3d 1309, 1324-25 (Fed. Cir. 2002). "When government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Southworth*, 529 U.S. at 235; *see Downs*, 228 F.3d at 1011-14 ("In order for the speaker to have the opportunity to speak as the government, the speaker must gain favor with the populace and survive the electoral process.").[22]

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[21] Such broad statements appear to this court to miss the nuances that should inform the question. It is one thing to recognize that the government in a democracy must make policy choices about those issues that are properly before it, and must be able to inform the public about why those choices were made. This case appears to present quite a different question. Here, the legislature has not made a decision about banning or even regulating the sale of tobacco products to adults, but rather seeks to persuade adults not to use tobacco products. In a sense, the path taken by Proposition 99 turns the democratic process on its head. Rather than citizens trying to persuade the government as to a proper course of its conduct, the government tries to dissuade the public from engaging in conduct it apparently does not have the political will to either regulate or ban. While these observations may well address questions of political philosophy rather than purely legal issues, they nonetheless appear appropriate, given that the entire government speech doctrine derives from political philosophy rather than a specific constitutional power.

[22] The assumption that a particular piece of government speech would suffice in the mind of the voting public to justify obtaining "newly elected officials" seems not just unrealistic, but also ignores the difficulty and vast costs of election campaigns in a state such as California. *See, e.g., California* (...continued)

Here, some may think that the issue is not as problematic as government's efforts to persuade the public might be in another context. They would take comfort from the fact that the advertisements in question derive not just from some government official's choice, but are instead the result of an initiative. In a sense, then, the program represents the direct decision of the majority of those voting to attempt to convince smokers to forego that vice. In this court's view, however, those facts provide cold consolation. The issue is not whether the majority of voters approve of the program, but whether in a system of limited government, such approval should be translated into a government sponsored propaganda effort. Indeed, as I have previously noted, the fact that a statute was adopted by the initiative process "provides no special insulation from review for asserted constitutional infirmity." *Service Employees Int'l Union* v. *Fair Political Practices Com.*, 747 F. Supp. 580, 583 (E.D. Cal. 1990) (citing *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 295, 70 L. Ed. 2d 492, 102 S. Ct. 434 (1981)). Again, notwithstanding this court's scruples, the present state of the government speech doctrine appears to provide no basis for limiting the advertisements in issue.

Certainly, the fact that the advertisements at issue are tax-supported provides no support for plaintiffs' claims. The government's speech is necessarily paid for by citizens, some of whom - like plaintiffs here - will disagree with its message. *See Southworth*, 529 U.S. at 229 ("It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens."). The

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ProLife Council v. *Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998). To say that the answer to abuse by government speech is political, frequently will simply mean that there is no answer.

High Court has consistently taught that such disagreement is simply the cost of living in a democracy and provides no basis under the First Amendment to silence the government or to excuse objecting citizens from having to share the costs of its speech. *See Lathrop* v. *Donohue*, 367 U.S. 820, 857, 6 L. Ed. 2d 1191, 81 S. Ct. 1826 (1961) (Harlan, J., concurring) ("A federal taxpayer obtains no refund if he is offended by what is put out by the United States Information Agency."); *United States* v. *Lee*, 455 U.S. 252, 260, 71 L. Ed. 2d 127, 102 S. Ct. 1051 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

The tobacco companies argue that a crucial difference between this case and others in which the courts have applied the government speech doctrine is that, here, the state is using taxes paid by a specific industry to finance advertising that condemns that very industry. Again, one may understand the plaintiffs' discomfort, but the Supreme Court has never suggested that the government speech doctrine applies only to speech funded with general tax revenues. On the contrary, it seems clear that speech by the government is government speech, however funded. That is, given that the tax is lawfully imposed, the money collected becomes the government's to expend as it sees fit, so long as those expenditures fall within legal limits. If this were not so, the Supreme Court's discussion of and reference to the government speech doctrine in *Abood*, 431 U.S. at 259 n. 13, *Keller*, 496 U.S. at 12-13, *Glickman*, 521 U.S. at 483, and *United Foods*, 533 U.S. at 417, would have been irrelevant surplusage. Indeed, the Court has recently declared that "the government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and

defend its own policies." *Southworth*, 529 U.S. at 229 (emphasis added);[23] *see also United Foods*, 533 U.S. at 425-26 (Breyer, J., dissenting) (arguing that if contested assessments on industry constituted "a targeted tax," government could fund advertising with such a tax, which, under *Southworth*, would be "binding on protesting parties."); *cf. Regan* v. *Taxation With Representation of Wash.*, 461 U.S. 540, 547, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes"); Laurence H. Tribe, American Constitutional Law, § 12-4 at 807 n. 14 (2d ed. 1988) (observing that while a taxpayer might have standing to challenge "an earmarked tax" used to fund government speech on a political or ideological issue, "it has been assumed that the taxpayer would lose any such challenge on the merits.").

Nor does the content or subject matter of the speech at issue alter the applicability of the government speech doctrine, as it might if the speech were religious, politically partisan, defamatory or in some other way subject to legal constraints. While the precise scope of the government speech doctrine has hardly been considered,

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[23] In *Southworth*, which concerned the constitutionality of a student activity fee that was used in part to fund student organizations engaging in political or ideological speech, the Court noted that because "the University had disclaimed that the speech was its own," the case did not present the question whether the challenge could be sustained "under the principle that the government can speak for itself." *Id.* at 234-35. The Court went on to observe that, "if the challenged speech here were financed by tuition dollars and the University and its officials were responsible for the content, the case might be evaluated on the premise that the government itself is the speaker." *Id.* Thus, the Court recognized the applicability of the government speech doctrine to speech funded not from general tax revenues, but from tuition dollars.

there is no doubt that modern government is called upon to deal with "innumerable subjects" on which government may be required to take a position and then explain its reasons for doing so. *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 598, 141 L. Ed. 2d 500, 118 S. Ct. 2168 (1998) (Scalia, J., concurring).

As the Supreme Court has recently observed, "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *Lorillard Tobacco* v. *Reilly*, 533 U.S. 525, 570, 150 L. Ed. 2d 532, 121 S. Ct. 2404 (2001) (quoting *FDA* v. *Brown & Williamson*, 529 U.S. 120, 161, 146 L. Ed. 2d 121, 120 S. Ct. 1291 (2000)); *cf. id.* at 528 ("The governmental interest in preventing underage tobacco use is substantial, and even compelling."); *Brown & Williamson*, 529 U.S. at 162 (Breyer, J., dissenting) ("Unregulated tobacco use causes more than 400,000 people to die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease. Indeed, tobacco products kill more people in this country every year than . . . AIDS, car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined." (citations and internal quotation marks omitted)). It seems clear that the dangers of tobacco use, with its concomitant effects on public health, are matters properly to be considered by the government and, upon adopting laws or regulations concerning such use, are proper subjects for government speech.

I have noted above my discomfort as to the propriety of the government's speech where the state has not sought to directly regulate the conduct that its speech condemns. Candor requires me to recognize that many others find no such discomfort. Indeed, government advertising to combat the public health problems caused by smoking is often cited as a paradigmatic instance of permissible government speech. *See, e.g.*, *Finley*, 524 U.S. at 610-11 (Souter, J., dissenting) (stating that in its role

as speaker, "the government is of course entitled to engage in viewpoint discrimination: if the Food and Drug Administration launches an advertising campaign on the subject of smoking, it may condemn the habit without also having to show a cowboy taking a puff on the opposite page."); Randall Bezanson and William Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1384 (2001) ("The simplest and clearest example of government advancing a point of view is provided when a 'law' specifically adopts a program of promoting a specific message. For example, a law might create a program to assist smokers to stop smoking.").

Put directly, while I believe that government speech doctrine raises profound questions concerning the appropriate role of government in a liberal society, the fact that the activity being condemned - the sale, purchase and use of tobacco by adults - is a legal activity does not, under present doctrine, appear to preclude government from actively discouraging that activity. On the contrary, the Ninth Circuit, by which I am bound, has recently indicated that the government speech would be unrestricted even if the sale of cigarettes were not only legal, but constitutionally-protected:

> We agree with the host of other circuits that recognize that public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of government power or sanction.

American Family Ass'n, Inc. v. *San Francisco*, 277 F.3d 1114, 1125 (9th Cir. 2002).[24] California's decision to

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[24] One pair of commentators have asserted that:

> Speech is but one means that government must have at its disposal to conduct its affairs and to

(...continued)

combat the problem through a strategy of education and counter-advertising, as opposed to outright prohibition, is, under present doctrine, a political and practical judgment

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> accomplish its ends. Restricting the use of tobacco, for example, might be accomplished by regulatory action that makes it sale or purchase or possession illegal. It might be accomplished by taxing the disfavored behavior or production. But the restriction might also be accomplished through the provision of information so that the consumer's choice will be knowing, or by direct persuasion in the form of government advertisements or by educational programs or even by subsidies for groups or organizations that speak out against tobacco use. These expressive forms of action are no less necessary or proper means, nor less practical, efficient, or effective

Randall Bezanson and William Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1380 (2001).

Another commentator has explained that "there are several ways of understanding government's contribution as speaker . . . Government speech can serve as an avenue for the representation of citizens' higher-minded desires even when as consumers they act with perhaps lower-minded motives (the smoker who supports Surgeon General's warnings against smoking, the careless litterer who supports environmental warning campaigns, etc.) . . . Government can use its speech powers to alter social norms that might be difficult for people to change through private action." Abner S. Greene, *Government Speech on Unsettled Issues*, 69 Fordham L. Rev. 1667, 1683-84 (2001).

While my own views suggest that a more restricted role for government speech is both appropriate and more consistent with the role of government in a democracy, these comments demonstrate that others are more sanguine about the exercise of the government's enormous power to persuade.

that the state is free to make. *See Lorillard Tobacco*, 533 U.S. at 587 ("The State's assessment of the urgency of the problem posed by tobacco is a policy judgment, and it is not this Court's place to second-guess it."); *id.* at 571 ("To the extent that federal law and the First Amendment do not prohibit state action, States and localities remain free to combat the problem of underage tobacco use by appropriate means."). In sum, the challenged program passes constitutional muster.

D. POTENTIAL LIMITATIONS ON GOVERNMENT SPEECH

Courts, including the Supreme Court and the Ninth Circuit, have framed the government speech doctrine in especially broad terms and have generally done so without discussing ways in which the Constitution, including constitutional provisions other than the First Amendment, may place substantive limits on the government's power to speak. Nonetheless, "the 'government speech' doctrine is still in its formative stages, and, as yet, it is neither extensively nor finely developed." *Sons of Confederate Veterans, Inc.* v. *Commissioner of Virginia Dept. of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc). As the contours of the doctrine develop more fully, it is to be hoped that the courts will recognize that limitations, both constitutional and otherwise derived, constrain the government's power to speak on controversial issues. *See Livestock Marketing*, 2003 U.S. App. LEXIS 13630, 2003 WL 21523837, at *8 ("The government speech doctrine clearly does not provide immunity for all types of First Amendment claims.") (citing *Santa Fe Sch. Dist* v. *Doe*, 530 U.S. 290, 147 L. Ed. 2d 295, 120 S. Ct. 2266 (2000) (prayers at public school football games)). Although these issues have not been raised by the parties and indeed, do not alter resolution of the case at bar, I pause briefly to address some of the important limitations on government speech in order to

emphasize that my conclusion regarding plaintiffs' free speech claim does not imply that the "government speech" doctrine offers a blank check for abuse.

First, and most obviously, the Establishment Clause prohibits government from using its speech to endorse religion. *See Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U.S. 226, 250, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990) (O'Connor, J., concurring) ("There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."). As the Court explained in *Lee* v. *Weisman*, 505 U.S. 577, 591, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992), "the First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all." (citations omitted).[25]

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[25] Plaintiffs open their brief by invoking Thomas Jefferson's pronouncement that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." P. Kurland & R. Lerner, eds, The Founders' Constitution, vol. 5 (1987) at 77. The quoted statement is taken from Jefferson's Virginia Bill for Establishing Religious Freedom, a landmark anti-establishment measure declaring that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever." Id. It is perhaps significant that the statement arose in this context, since "the Establishment Clause is a specific prohibition on forms of state intervention in (...continued)

Second, the First Amendment may place other substantive limits on the government's use of speech. For instance, government speech that "drowns out" private speech may violate the First Amendment. *See NAACP* v. *Hunt*, 891 F.2d 1555, 1556 (11th Cir. 1990) ("The government may not monopolize the 'marketplace of ideas,' thus drowning out private sources of speech . . . For example, the government may not confer radio frequency monopolies on broadcasters it prefers."); *Warner Cable Communications* v. *City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) ("The government may not speak so loudly as to make it impossible for other speakers to be heard by their audience. The government would then be preventing the speakers' access to that audience, and first amendment concerns would arise.").[26] For this reason, it is particularly important for courts to carefully distinguish between situations in which the government speaks for itself and situations in which the government creates a public forum for private speech. As Judge Luttig recently observed, it may even be that these categories will not always be mutually exclusive. *See Sons of Confederate Veterans*, 305 F.3d at 245 (Luttig, J., respecting denial of rehearing en banc).

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religious affairs with no precise counterpart in the speech provisions." *Lee* v. *Weisman*, 505 U.S. 577, 591, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992).

[26] Here, of course, the "drown out" concern appears inapplicable. The tobacco industry spends much more than California does on advertising within the state itself, even excluding national advertising expenditures that have an impact in California. In 1999/2000, the tobacco industry spent an estimated $ 823 Million advertising and promoting tobacco use in California, an amount that translates into $ 34.01 for every man, woman and child in the state. In contrast, the state's tobacco control budget for 1999/2000 was $ 3.42 per capita. *See* DHS, California Tobacco Control Update (Nov. 2002).

Third, the Constitution would appear to contain a core structural principle, perhaps embodied in the Republican Form of Government Clause, that would limit the use of tax dollars to fund overtly partisan activity.[27] *See NEA* v. *Finley*, 524 U.S. 569, 598, 141 L. Ed. 2d 500, 118 S. Ct. 2168 (1998) (Scalia, J., concurring) ("It would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party - but it would be just as unconstitutional for the government itself to promote candidates nominated by the Republican Party, and I do not think that that unconstitutionality has anything to do with the First Amendment."); *Lathrop* v. *DonOhue*, 367 U.S. 820, 853, 6 L. Ed. 2d 1191, 81 S. Ct. 1826 (1961) (Harlan, J., concurring in the judgment) (stating that a legislature could not constitutionally "'create a fund to be used in helping certain political parties or groups favored' by it 'to elect their candidates or promote their

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[27] Article IV, § 4 of the Constitution, which provides that "the United States shall guarantee to every State in this Union a Republican Form of Government," is generally treated as judicially unenforceable, based on a series of decisions thought to have established a per se rule of nonjusticiability. *See Colegrove* v. *Green*, 328 U.S. 549, 556, 90 L. Ed. 1432, 66 S. Ct. 1198 (1946) ("Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts."). In recent years, however, a growing chorus of academic critics has urged the Court to abandon the per se nonjusticiability rule in Guarantee Clause cases. *See* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849, 850 n.4 (1994). Recently, the Court has shown some signs of receptiveness to these arguments, and "has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." *New York* v. *United States*, 505 U.S. 144, 185, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) (O'Connor, J.) (declining to decide the issue); *see Reynolds* v. *Sims*, 377 U.S. 533, 582, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964) ("some questions raised under the Guarantee Clause are nonjusticiable").

controversial causes'" (quoting *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 788, 6 L. Ed. 2d 1141, 81 S. Ct. 1784 (1961) (Black, J., dissenting)). One recent commentator has argued for an even broader "political anti-establishment" principle, which would prohibit a range of speech activity by the government in the sphere of election activities in a manner analogous to the Establishment Clause. *See generally* Brian P. Marron, *Doubting America's Sacred Duopoly: Disestablishment Theory and the Two-Party System*, 6 Tex. F. on C.L. & C.R. 303 (2002).[28] Such a principle might be thought to flow from Justice Jackson's eloquent statement, which remains perhaps the best encapsulation of the First Amendment's core values: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943). *But see American Family Ass'n* v., 277 F.3d 1114, 1124 (9th Cir. 2002) (holding that for the orthodoxy-of-belief prohibition to apply, there must be more than mere speech by the government; rather, there must be "actual or threatened imposition of government power or sanction."). Whatever its source, it seems clear that the Constitution places some structural

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[28] This article is a recent revival of an argument advanced in the earlier work of two scholars, both of whom argued for broad limitations on government speech. *See* Mark G. Yudof, *When Government Speaks* (1983); Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 Cal. L. Rev. 1104 (1979). These broad arguments have gained few adherents among commentators, however, and even its chief proponents appear to have recognized that the theory is out of step with current jurisprudence. *See* Robert D. Kamenshine, *Reflections on Coerced Expression*, 34 Land & Water L. Rev. 101 (1999).

limits, as yet undefined, on the ability of government officials to divert public funds for partisan speech.

Fourth, it is possible that the Due Process Clause and the Equal Protection Clause may provide substantive limitations on government speech programs where the legislative classifications do not bear a rational relationship to a legitimate state interest. *See Richardson* v. *City & County of Honolulu*, 124 F.3d 1150, 1162 (9th Cir. 2000).[29] Imagine a situation in which a state legislature, under the influence of a powerful dairy industry, decides to tax the margarine industry and use the money for baseless ads attacking the industry. Such a scheme, it seems, would not hold up to constitutional scrutiny. "Protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *See Craigmiles* v. *Giles*, 312 F.3d 220 (6th Cir. 2003) (rejecting proffered health and safety justifications and holding that a state's prohibition on the sale of caskets by anyone not licensed as a funeral director violated due process and equal protection clauses); *see*

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[29] Some have also suggested that government speech with discriminatory content would be barred by equal protection or anti-endorsement principles. *See, e.g.*, James Forman, Note, *Driving Dixie Down: Removing the Confederate Flag from the Southern State Capitols*, 101 Yale. L.J. 505 (1991) (arguing that the Southern states' flying of the Confederate Flag "constitutes government endorsement of discrimination by private parties" and is therefore unconstitutional); *cf. American Family Ass'n*, 277 F.3d at 1127 (Noonan, J., dissenting) ("Suppose a city council today, in the year 2002, adopted a resolution condemning Islam because its teachings embraced the concept of a holy war and so, the resolution said, were 'directly correlated' with the bombing of the World Trade Center. Plausibly the purpose might be to discourage terror bombings. Would any reasonable, informed observer doubt that the primary effect of such an action by a city could be the expression of official hostility to the religion practiced by a billion people?").

City of Philadelphia v. *New Jersey*, 437 U.S. 617, 624, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978) (holding, in dormant commerce clause context, that "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.").

Finally, the Constitution places substantial limits on the government's ability to use its speech to interfere with or punish constitutionally-protected activity. As a general rule, of course, the Supreme Court's "unconstitutional conditions" jurisprudence has said that the state may exercise its power to spend in order to discourage protected activity. *See, e.g.*, *Maher* v. *Roe*, 432 U.S. 464, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977) (holding that the government "may make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds."). Perhaps the most extreme (and extremely controversial) application of this principle was *Rust* v. *Sullivan*, 500 U.S. 173, 192-93, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991), which sustained a prohibition on abortion-related advice by recipients of federal funds designated for family-planning counseling.[30] But even there, the Court was careful to emphasize the difference between discouragement and coercion:

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[30] While "*Rust* did not place explicit reliance on the [government speech rationale], when interpreting the holding in later cases [the Court has] explained *Rust* on this understanding." *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 540, 149 L. Ed. 2d 63, 121 S. Ct. 1043 (2001). This explanation of *Rust*'s holding, however, may be dicta. *See Brown* v. *California Dep't of Transp.*, 321 F.3d 1217, 1225 (9th Cir. 2003) ("*Rust* addresses only the government's ability to exclude from a government-funded program speech is incompatible with the program's objectives."); *Velazquez*, 531 U.S. at 554 (Scalia, J., dissenting) (stating that if the speech "at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would not be government speech").

> A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity. There is a basic difference between direct state interference with a protected activity and state encouragement of alternative activity consonant with legislative policy.

500 U.S. at 193 (quoting *Harris* v. *McRae*, 448 U.S. 297, 317 n.19, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980)); Maher, 432 U.S. at 475) (internal quotation marks and citations omitted); *see also American Family Ass'n*, 277 F.3d at 1125 (holding that government may criticize protected activity "so long as there is no actual or threatened imposition of government power or sanction").

It is easy to imagine, however, a government speech program that goes beyond mere discouragement and crosses into constitutionally-forbidden territory. Suppose, for instance, that a state decided to levy a severely punitive per-procedure tax on doctors who perform abortions and directed that the revenue thereby derived be used to fund an aggressive public advertising campaign designed to intimidate women seeking abortions and vilify the doctors who provide them. The government speech doctrine notwithstanding, such a program would undoubtedly constitute an impermissible "penalty" on, or an instance of "direct state interference" with, protected activity. As even the *Rust* Court implicitly acknowledged, such a program would fail constitutional scrutiny.

Plaintiffs make no claim that the advertisements at issue fall within any of the above limitations or the government speech doctrine, and it does not require extended discussion to recognize that their reticence is entirely proper. While it is likely that as the government speech doctrine develops, other limitations will be recognized, plaintiffs do not suggest any such development. Nonetheless, it is appropriate to reiterate

that government is no more free to disregard constitutional and other legal norms when it speaks than when it acts.

V.

ARTICLE I OF THE CALIFORNIA CONSTITUTION

In addition to their First Amendment claim, plaintiffs' bring an identical claim under the California Constitution's free speech clause. *See* Cal. Const., Art. I, § 2. In *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 117, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984), however, the Supreme Court held that "a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has an impact directly on the State itself." As plaintiffs now concede, this is such a suit. Because the Eleventh Amendment operates as a restriction on the jurisdiction of the federal courts, *see California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 140 L. Ed. 2d 626, 118 S. Ct. 1464 (1998), plaintiffs' claim under the California Constitution must be dismissed without prejudice to it being re-filed in a court of competent jurisdiction. *See Freeman* v. *Oakland Unified Sch. Dist.*, 179 F.3d 846, 847 (1999) (reversing district court's dismissal with prejudice of state law claim barred by *Pennhurst*); *Frigard* v. *United States*, 862 F.2d 201, 204 (9th Cir.1988) (holding dismissals for lack of jurisdiction "should be . . . without prejudice so that a plaintiff may reassert his claims in a competent court").

VI.

SEVENTH AMENDMENT

The Seventh Amendment provides in relevant part: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved." U.S. Const., amend. VII. Plaintiffs' attempt to invoke this provision must fail. It is

established that the right to a jury trial in civil cases under the Seventh Amendment is not among those provisions of the Bill of Rights that have been made applicable to the states through the Fourteenth Amendment. *See Gasperini* v. *Center for Humanities*, Inc., 518 U.S. 415, 418, 135 L. Ed. 2d 659, 116 S. Ct. 2211 (1996) ("Seventh Amendment . . . governs proceedings in federal court, but not in state court"); *Curtis* v. *Loether*, 415 U.S. 189, 192 n.6, 39 L. Ed. 2d 260, 94 S. Ct. 1005 (1974) (the Supreme Court "has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment"); *Walker* v. *Sauvinet*, 92 U.S. 90, 92, 23 L. Ed. 678 (1875) ("The States, so far as [the Fourteenth] amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury . . . is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge."). Because defendants are state officials, and because the Seventh Amendment does not restrain the conduct of state officials, plaintiffs cannot maintain a Seventh Amendment claim against them.

VII.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Finally, plaintiffs argue that the State's broadcast of its ads denies them due process of law. To establish a procedural due process claim, plaintiffs must first show the deprivation of a liberty or property interest protected by the Due Process Clause. *See Bd. of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). "Plaintiffs all are corporations. Corporations do not have fundamental rights; they do not have liberty interests, period." *Nat'l Paint & Coatings Ass'n* v. *City of Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995). Corporations

do have property interests, however, that may be protected by procedural due process.

Here, plaintiffs allege that the challenged ads stigmatize them and publicly disparage their reputation and character. *See* Complaint at 11, P40. Allegations of injury to reputation alone, however, cannot support a claim for violation of due process, and therefore must be accompanied by a constitutionally recognized injury. *See Paul* v. *Davis*, 424 U.S. 693, 712, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976). This rule, labeled the "stigma-plus" standard, requires a plaintiff to show that the government official's conduct deprived the plaintiff of a previously recognized property or liberty interest in addition to damaging the plaintiff's reputation. *Id.* at 712. The rule is designed to prevent the Due Process Clause from becoming an all-purpose constitutionalization of state tort law. *Id.* at 701. The Supreme Court has explained that an "interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law[.]". *Id.* at 712; *cf. Siegert* v. *Gilley*, 500 U.S. 226, 234, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991) ("Most defamation plaintiffs attempt to show some sort of special damage and out-of-pocket loss which flows from the injury to their reputation. But so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a *Bivens* action."). The Ninth Circuit has made clear that this rule is no less applicable to businesses, holding that the dissemination of a defamatory government report did not deprive a California business of "property" in its customer goodwill.

See WMX Technologies, Inc. v. *Miller*, 197 F.3d 367, 376 (9th Cir. 1999) (en banc).

Plaintiffs' attempts to satisfy the "plus" element of the "stigma-plus" requirement essentially by re-alleging that they have been deprived of their Seventh Amendment right to a fair trial. *See* Pls.' Reply Br. at 17-18. In proceeding this way, plaintiffs' third cause of action (due process) depends necessarily on the resolution of their fourth cause of action (the Seventh Amendment). Hence, because the Seventh Amendment claim fails as a matter of law, the due process claim likewise fails.

Although plaintiffs fail to state a claim for denial of procedural due process, if the plaintiffs truly believe that the challenged advertisements are both provably false and disparaging to their business reputations, they are free to seek relief against the State of California or its officials in a defamation action under state law.[31]

VIII.

CONCLUSION

Plaintiffs state no claims upon which relief can be granted. Accordingly, the Court hereby ORDERS as follows:

1. Defendants' motion to dismiss is GRANTED.

2. Plaintiffs' motion for a preliminary injunction is DENIED as moot.

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[31] Plaintiffs' Due Process claim has other problems. To be cognizable, the claim must allege the government's stigmatizing speech is "substantially false." *Campanelli* v. *Bockrath*, 100 F.3d 1476, 1484 (9th Cir. 1996) (citing *Codd* v. *Velger*, 429 U.S. 624, 628, 51 L. Ed. 2d 92, 97 S. Ct. 882 (1977) (per curiam)). Plaintiffs' allegations appear insufficient in that regard. I do not rely on that ground, since it is susceptible to cure by amended pleading.

3. As to plaintiffs' claim under Article I of the California Constitution, the Clerk is directed to enter judgment against the plaintiffs without prejudice.

4. As to plaintiffs' claims under the First Amendment, the Seventh Amendment and the Due Process Clause of the Fourteenth Amendment, the Clerk is directed to enter judgment against the defendants with prejudice.

5. The Clerk is directed to CLOSE the case.

IT IS SO ORDERED.

DATED: July 22, 2003.

LAWRENCE K. KARLTON
SENIOR JUDGE

UNITED STATES DISTRICT COURT

JUDGMENT IN A CIVIL CASE

FILED July 22, 2003

Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

ENTERED: July 22, 2003

PROVISIONS OF CALIFORNIA TOBACCO TAX AND HEALTH PROMOTION ACT OF 1988
(Cal. Rev. & Tax. Code § 30121 *et seq.*)

§ 30122. Cigarette and Tobacco Products Surtax Fund

(a) The Cigarette and Tobacco Products Surtax Fund is hereby created in the State Treasury. The fund shall consist of all revenues deposited therein pursuant to this article. Moneys in the fund may only be appropriated for the following purposes:

(1) Tobacco-related school and community health education programs.

(2) Tobacco-related disease research.

(3) Medical and hospital care and treatment of patients who cannot afford to pay for those services, and for whom payment will not be made through any private coverage or by any program funded in whole by the federal government.

(4) Programs for fire prevention; environmental conservation; protection, restoration, enhancement, and maintenance of fish, waterfowl, and wildlife habitat areas; and enhancement of state and local park and recreation purposes.

(b) The fund consists of six separate accounts, as follows:

(1) The Health Education Account, which shall only be available for appropriation for programs for the prevention and reduction of tobacco use, primarily among children, through school and community health education programs. Revenues from the Health Education Account shall not be used to match federal funds for any purpose.

(2) The Hospital Services Account, which shall only be available for appropriation for payment to public and

private hospitals licensed pursuant to subdivision (a) of Section 1250 of the Health and Safety Code for the treatment of hospital patients who cannot afford to pay for that treatment and for whom payment for hospital services will not be made through private coverage or by any program funded in whole by the federal government.

(3) The Physician Services Account, which shall only be available for appropriation for payment to physicians for services to patients who cannot afford to pay for those services, and for whom payment for physician services will not be made through private coverage or by any program funded in whole by the federal government.

(4) The Research Account, which shall only be available for appropriation for tobacco-related disease research. Revenues from the Public Research Account shall not be used to match federal funds for any purpose.

(5) The Public Resources Account, which shall only be available for appropriation in equal amounts for both of the following:

(A) Programs to protect, restore, enhance, or maintain fish, waterfowl, and wildlife habitat on an equally funded basis.

(B) Programs to enhance state and local park and recreation resources.

(6) The Unallocated Account, which shall be available for appropriation for any purpose specified in subdivision (a).

§ 30123. Imposition of tax on distributors; What wholesale cost does not include

(a) In addition to the tax imposed upon the distribution of cigarettes by this chapter, there shall be imposed upon every distributor a tax upon the distribution of

cigarettes at the rate of twelve and one-half mills ($ 0.0125) for each cigarette distributed.

(b) There shall be imposed upon every distributor a tax upon the distribution of tobacco products, based on the wholesale cost of these products, at a tax rate, as determined annually by the State Board of Equalization, which is equivalent to the combined rate of tax imposed on cigarettes by subdivision (a) and the other provisions of this part.

(c) The wholesale cost used to calculate the amount of tax due under subdivision (b) does not include the wholesale cost of tobacco products that were returned by a customer during the same reporting period in which the tobacco products were distributed, when the distributor refunds the entire amount the customer paid for the tobacco products either in cash or credit. For purposes of this subdivision, refund or credit of the entire amount shall be deemed to be given when the purchase price less rehandling and restocking costs is refunded or credited to the customer. The amount withheld for rehandling and restocking costs may be a percentage of the sales price determined by the average cost of rehandling and restocking returned merchandise during the previous accounting cycle.

§ 30124. Deposit of moneys; Reversion of funds

(a) With the exception of payments of refunds made pursuant to Article 1 (commencing with Section 30361) of Chapter 6, and reimbursement of the State Board of Equalization for expenses incurred in the administration and collection of the tax imposed by Section 30123, pursuant to its powers vested by this part, all moneys raised pursuant to the taxes imposed by Section 30123 shall be deposited into the fund as provided in subdivision (b).

(b) Moneys shall be deposited in the fund according to the following formula:

(1) Twenty percent shall be deposited in the Health Education Account.

(2) Thirty-five percent shall be deposited in the Hospital Services Account.

(3) Ten percent shall be deposited in the Physician Services Account.

(4) Five percent shall be deposited in the Research Account.

(5) Five percent shall be deposited in the Public Resources Account.

(6) Twenty-five percent shall be deposited in the Unallocated Account.

(c) Any amounts appropriated from any account specified in subdivision (b) which is not encumbered within the period prescribed by law shall revert to the account from which it was appropriated.

(d) This section shall become operative July 1, 1996.

FILED
FEB 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-867

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO.; LORILLARD TOBACCO CO.; and R.J. REYNOLDS SMOKE SHOP, INC.,
Petitioner,

v.

SANDRA SHEWRY, Director of the California Department of Health Services; DILEEP G. BAL, Acting Chief of the Tobacco Control Section of the California Department of Health Services; and STATE OF CALIFORNIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Date: February 7, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the First Amendment prohibits government from levying a tax that applies solely to a discrete disfavored group and using the dedicated revenues from the tax to fund government speech attacking the very same group that is subject to the tax.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 05-867

R.J. REYNOLDS TOBACCO CO.; LORILLARD TOBACCO CO.; and R.J. REYNOLDS SMOKE SHOP, INC.,
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v.

SANDRA SHEWRY, Director of the California Department of Health Services; DILEEP G. BAL, Acting Chief of the Tobacco Control Section of the California Department of Health Services; and STATE OF CALIFORNIA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF)[1] is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

resources to promoting free speech rights, both of individuals and of the business community. To that end, WLF has appeared before this Court as well as other federal and state courts in cases raising important First Amendment issues, particularly compelled speech issues. *See, e.g., Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001); *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000); *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997); *Keller v. State Bar of California*, 496 U.S. 1 (1990). WLF also filed a brief in this case when it was before the court of appeals.

WLF is concerned by what it views as the Ninth Circuit's overly broad interpretation of the "government speech" defense to compelled speech claims. If that defense is really as broad as the Ninth Circuit claims it to be, then governments everywhere have been given an easily-followed roadmap that will allow them to defeat any and all compelled speech claims. Given the importance that this Court has placed on the First Amendment right both to speak *and* to refrain from speaking, WLF does not believe that the entire compelled speech doctrine should so lightly be cast away.

STATEMENT OF THE CASE

Respondents manage California's Department of Health Services (DHS), which for more than a decade has conducted a hard-hitting advertising campaign that seeks to vilify the tobacco industry. The campaign is paid for solely out of funds collected from Petitioners R.J. Reynolds Tobacco Co. and R.J. Reynolds Smoke Shop, Inc. ("Reynolds"), Petitioner Lorillard Tobacco Co. ("Lorillard"), and other participants in the tobacco industry. The funds are generated by a 25 cent per-pack tax (the "Surtax") on cigarette sales by distributors of tobacco products in California. REV. & TAX. CODE § 30123.

Funds generated by the Surtax may only be used for a limited number of tobacco-related purposes; a significant portion of those funds are placed in the State's "Health Education Account" and used to finance DHS's vilification campaign. Not surprisingly, Reynolds and Lorillard object to being forced to finance an advertising campaign that calls the tobacco industry "deceptive," a "dangerous enemy," and indifferent to the health of its customers, and that routinely accuses the industry of lying to the public. They also object to the fact that, by hiring actors to portray tobacco industry making outrageous statements, the advertisements strongly suggest that the statements are those of the tobacco industry itself.

Reynolds and Lorillard filed suit against DHS officials in the U.S. District Court for the Eastern District of California, alleging that they are protected by the First Amendment from being forced to pay for DHS advertisements that vilify the tobacco industry.[2] Reynolds and Lorillard subsequently filed a motion for a preliminary injunction, and DHS filed a motion to dismiss the complaint.

On July 22, 2003, the district court denied Reynolds's and Lorillard's motion and granted the motion to dismiss. Pet. App. 49a-99a. Initially, the court held that the plaintiffs had standing to raise their constitutional claims. *Id.* 57a-62a. The court nonetheless dismissed the plaintiffs' First Amendment compelled speech claims on the ground that DHS's vilification campaign constitutes "government speech" and that such speech is largely immune from First Amendment compelled speech challenges. *Id.* at 75a-87a.

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[2] Reynolds and Lorillard also alleged that the advertisements interfered with their Seventh Amendment right to trial by jury and unfairly stigmatized them in violation of the Fourteenth Amendment's Due Process Clause. Those issues are not included within the Petition.

A divided Ninth Circuit panel affirmed. *Id.* 48a, 1a-45a. The majority agreed with the district court that the vilification campaign constitutes "government speech" and as such is not subject to First Amendment constraints when (as here) government officials exercise direct control over the content of the speech. *Id.* 15a-19a. The court held that the government speech doctrine bars First Amendment compelled speech claims even when (as here) the complained-of speech is funded entirely by a levy on a very small group that includes the plaintiffs. *Id.* 21a-24a. The court held that Petitioners could not prevail on their First Amendment claims in the absence of evidence that the government's speech was effectively preventing Petitioners from expressing a contrary point of view. *Id.* 24a-25a.

Judge Trott dissented. *Id.* 48a, 31a-44a. He stated:

> [T]he compelled assessments in this case constitute an exceptional case of government intrusion on the right not to be compelled to finance speech. Indeed, the Act is designed to force one particularly disfavored group to fund speech directly undermining that group's reputation. Such speech offends the very essence of the First Amendment.

Id. 43a. He said that by financing the speech through levies imposed only on those targeted by the vilification campaign, California had removed normal democratic restraints on its spending, and thus "this tax becomes the ultimate cheap shot, one not fully subject to the considerations that normally attend the decision to require the public to pay for something." *Id.*

While a petition for panel rehearing and rehearing *en banc* was pending, this Court handed down its decision in *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005);

that decision prompted the panel to request supplemental briefing on the impact of *Johanns* on the case. The appeals court denied the petition on September 9, 2005. In connection with that denial, both the majority and dissent re-issued their panel opinions, with "postscripts" addended to discuss the impact of *Johanns*. Pet. App. 29a-30a, 44a-47a. The majority concluded that "the *Johanns* opinion affirms our reasoning." *Id.* 30a. Judge Trott disagreed and remained in dissent. He explained:

> In our case, however, the purpose of the coerced speech is deliberately destructive of those forced to pay for it – not so in *Johanns*. Does this difference matter here? I think it does. The difference is not just one of degree, but of material kind. It is one thing to promote the sale of an agricultural product; it is altogether another to attempt to destroy an entire legal industry.

Id. 47a. He stated that *Johanns* mandated that Petitioners be provided an opportunity at trial to demonstrate that the vilification campaign, particularly advertisements featuring actors portraying cigarette industry executives, amounted to compelled speech in violation of their First Amendment rights. *Id.* 46a-47a.

REASONS FOR GRANTING THE PETITION

This case raises First Amendment issues of exceptional importance. This Court in *Johanns v. Livestock Marketing Ass'n*, 125 S. Ct. 2055 (2005), for the first time recognized a "government speech" defense in cases in which plaintiffs allege a violation of their First Amendment right not to be compelled to speak against their will. In response, the Ninth Circuit has run with the "government speech" defense and applied it with a vengeance. It has construed "government

speech" so broadly that future plaintiffs will find it virtually impossible to demonstrate that government-directed use of their funds to finance speech violates their First Amendment rights. That interpretation of the government speech defense is impossible to square with Thomas Jefferson's admonition, frequently cited approvingly by the Court, that "'to compel a man to furnish contributions of money for the propagation of opinions he disbelieves is sinful and tyrannical.'" *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234 n.31 (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)). Review is warranted to determine whether, as the Ninth Circuit determined, the government speech defense ought to be read so broadly as to nullify decades of compelled speech case law.

The Ninth Circuit's startling interpretation of *Johanns* is far from self-evident. *Johanns* vacated a judgment that had affirmed a *facial* challenge to a federal law that compelled beef producers to contribute to a fund used to promote beef sales, explaining that "compelled funding of government speech *does not alone* raise First Amendment concerns." *Johanns*, 125 S. Ct. at 2062 (emphasis added). The Court nonetheless made clear that such compelled funding could under certain circumstances – for example, if the speech is "attributed to someone other than the government," *id.* at 2064 – give rise to *as applied* First Amendment challenges to the funding scheme. *Id.* at 2065. Yet, by granting California's motion to dismiss Petitioners' as-applied challenge for failure to state a claim, the courts below have granted governments free rein to compel funding of virtually any speech, no matter how strongly the contributor may object and no matter that the contributor objects that at least a portion of the speech is being directly attributed to him. Apparently, all a government need do to achieve this result, at least according to the Ninth Circuit, is to ensure that the funds at some point pass through government hands.

Nothing in the Court's case law compels such a result. Indeed, there is a strong argument to be made that a law compelling private speakers to support and associate themselves with government speech should be subject to *stricter* constitutional scrutiny than one that compels them to support private speech. No value is more central to the First Amendment doctrine – one could fairly describe it as the reason we *have* the First Amendment – than the freedom of private speakers to *disassociate* themselves from the government.

The Court recognized in *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990), that some sort of government speech defense is appropriate because "government officials are expected as a part of the government process to espouse the views of the majority of their constituents," and is necessary to prevent dissenting citizens from invoking the compelled speech doctrine to *silence* the government. But nothing in *Keller* or *Johanns* endorses the Ninth Circuit's holding that – contrary to Thomas Jefferson's admonition – there are virtually *no* First Amendment limitations on the government's authority to compel private individuals to support and be associated with its speech. Review is warranted to determine whether the compelled speech doctrine has been eviscerated to such an extent.

Review is also warranted because the decision below has led to sharp conflicts among federal judges. Judge Trott's dissenting opinion in this case eloquently lays out the serious constitutional concerns implicated when, as here, private entities are forced to finance advertisements that accuse them of being liars and killers. That compelled funding of such vicious speech has been upheld by the lower courts is likely a testament to the extreme unpopularity of the tobacco industry. WLF ventures to guess that courts would not tolerate similar

mistreatment of, for example, abortion providers. Indeed, a federal district court in Alabama invoked Judge Trott's reasoning to strike down government efforts to compel abortion clinics to provide financial support to the government's anti-abortion speech – under circumstances factually indistinguishable from this case in all material respects. *Summit Medical Center of Alabama, Inc. v. Riley*, 284 F. Supp. 2d 1350, 1362 (M.D. Ala. 2003). Review is warranted to resolve that conflict and to determine whether members of disfavored industries are entitled to the same First Amendment rights as are all other Americans.

I. REVIEW IS WARRANTED TO DETERMINE WHETHER THE APPEALS COURT CORRECTLY READ *JOHANNS* AS NULLIFYING DECADES OF COMPELLED SPEECH CASE LAW

The Court has frequently cited with approval Thomas Jefferson's admonition that "'to compel a man to furnish contributions of money for the propagation of opinions he disbelieves is sinful and tyrannical.'" *See, e.g., Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234 n.31 (quoting I. Brant, *James Madison: The Nationalist* 354 (1948)). The Court has demonstrated its faithfulness to Jefferson by declaring that the First Amendment compelled speech doctrine extends not only to forcing individual citizens to utter or display the government's message, *e.g. Wooley v. Maynard*, 430 U.S. 705, 713-15 (1977) (display of state motto, "Live Free or Die" on automobile license plate); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943) (recitation of Pledge of Allegiance), but also to forcing individuals to provide financial support for speech to which one objects. *See, e.g., Abood* and *Keller*.

Yet, little remains of the compelled speech doctrine if the Ninth Circuit's understanding of the government speech defense (as articulated in *Johanns*) is correct. According to the Ninth Circuit, any speech paid for with funds belonging to (or transferred from) the government is "government speech" that is exempt from First Amendment compelled speech constraints. Pet. App. 15a-19a. If that were true, any government could avoid all those pesky compelled speech cases simply by redirecting the flow of funds. For example, governments seeking to avoid First Amendment challenges to expenditures by State bars could require lawyers to pay bar dues directly to the State government (rather than to quasi-government bar associations) and then pass the fees along to the bar associations. City governments could require their non-union employees to pay fees directly to the city (rather than to labor unions) and then pass the fees on to the labor union. When the U.S. Supreme Court invoked the First Amendment to bar compelled speech in each of those situations, it is highly unlikely that the Court contemplated that governments could so easily avoid First Amendment strictures by redirecting the flow of funds; the tyrannical nature of compelled contributions to the propagation of opinions one disbelieves is not dissipated simply because the government has slapped its imprimatur on the speech.

Moreover, the danger of the Ninth Circuit's approach is not limited to cases involving compelled *financial* support of objected-to speech. If placing the government's imprimatur on speech is sufficient to invoke the "government speech" defense, then little remains of *Wooley*'s prohibition against requiring motorists to display the State's motto. After all, few if any passers-by would think that the motorist's display of the State motto connotes support for the message, and the motorist could eliminate any possibility of confusion by displaying his own sign disclaiming any support. Yet under the Ninth

Circuit's approach to the government speech defense (which denied Petitioners' effort to introduce factual evidence in support of an as-applied challenge), California could require its citizens to display a wide-variety of State-sponsored messages. Review is warranted to determine whether the Ninth Circuit's correctly read *Johanns* as adopting such a broad understanding of the government speech defense.

A. The Decision Below Sanctions Dismissal of As-Applied Compelled Speech Challenges Without Regard to the Strength of the Dissenter's Objection and to Claims That the Speech Is Being Attributed to Him

The contrast between the factual and legal postures of this case and *Johanns* could not be more striking. By reflexively applying *Johanns*'s government speech defense in a markedly different setting the Ninth Circuit has threatened serious erosion of First Amendment rights.

First, *Johanns* came to the court after a full trial, while this case came to the Ninth Circuit on appeal from a grant of California's motion to dismiss for failure to state a claim. Thus, although *Johanns* recognized that the First Amendment may prohibit the federal government from running "buy beef" advertisements claiming that dissenting beef producers support the advertisements, it held that the evidence at trial was insufficient to support a *facial* First Amendment challenge to the Beef Promotion and Research Act of 1985, 99 Stat. 1597, because the Act did not *require* that advertisements include such claims. *Johanns*, 125 S. Ct. at 2064-65. In contrast, the Ninth Circuit affirmed dismissal of Petitioners' *as-applied* challenge and refused to allow them to introduce evidence to demonstrate that statements in the advertisements were being attributed to Petitioners. Although conceding that the

advertisements included statements attributed to cigarette industry executives – statements that placed the industry in an extremely negative light – the Ninth Circuit insisted that the statements were insufficient to state a compelled speech claim because they were "unmistakable satire" and could not have been understood by a "reasonable viewer" to represent the views of "actual tobacco executives." Pet. App. 30a. Under that extremely broad view of the government speech defense, Mr. Maynard could not have prevailed in his First Amendment challenge to the New Hampshire requirement that he display automobile license plates bearing the State motto, because no one contended that passing motorists inferred from that display that Mr. Maynard subscribed to the State motto.[3] By invoking *Johanns* at the pleadings stage to dismiss an as-applied challenge, the Ninth Circuit expanded the scope of the government speech defense far beyond anything contemplated by this Court.

Second, as Judge Trott recognized in dissent, there is a difference "not just . . . of degree, but of material kind" between the compelled speech at issue here and compelling agricultural producers to provide funding for advertisements promoting their products on a generic basis. Pet. App. 47a. WLF recognizes that some agricultural producers believe that their products are superior in quality to products of like kind being offered in the marketplace and thus do not approve of advertisements that promote their products on a generic basis.

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[3] Moreover, it is bewildering for the Ninth Circuit to suggest that "[n]o reasonable viewer" would believe that the words attributed to cigarette industry executives had actually been spoken by industry executives. Given that the vilification campaign regularly accuses industry executives of being liars and killers, it is not only possible but highly probable that many viewers believed that industry executives had spoken the words in question.

But as the Court has recognized, such generic advertising nonetheless provides some benefits to all producers, including dissenters. Thus, the Court has recognized that such objections to generic advertising are largely "trivial" and in any event are not "comparable to those [cases] in which an objection rested on political or ideological disagreement with the content of the message." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 471, 472 (1997). In contrast, the compelled speech to which Petitioners object is, as Judge Trott recognized, "deliberately destructive of those forced to pay for it." Pet. App. 47a. California is forcing Reynolds, Lorillard, and the remainder of the cigarette industry to pay into a special fund, and then is using that fund to pay for speech accusing them of a wide range of criminal and unethical behavior. WLF cannot imagine speech that an individual could have greater objection to being forced to fund, yet the Ninth Circuit deemed the subject matter of the compelled speech totally irrelevant in determining that the government speech doctrine barred all First Amendment claims. Review is warranted to determine whether this Court intended the government speech defense to apply so broadly.

B. The Court Has Construed The Government Speech Doctrine As Necessary To Ensure Governments' Ability To Participate in Debate, Not To Grant Government The Power To Force Citizens To Associate With Speech With Which They Disagree

Review is also warranted because the decision below was based on a fundamental misunderstanding of the government speech defense.

The rationale underlying that defense was perhaps best expressed in *Keller*. The Court explained that "government speech" needs to be excepted from the compelled speech

doctrine to ensure that dissenting citizens cannot invoke the compelled speech doctrine to silence the government altogether:

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making government decisions were not free to speak for themselves in the process. If every citizen were to have a right to insist that no one paid with public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Keller, 496 U.S. at 12-13.[4]

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[4] The Court ultimately concluded that the State Bar of California was not an entity qualified to invoke the "government speech" defense because it had "special characteristics" that set it apart from a more typical government agency. *Id.* at 12. Among those characteristics were: (1) its principal funding source was membership dues, rather than appropriations made to it by the legislature; and (2) all California lawyers were required to be members, and they were the only members. *Id.* at 11. Because of that conclusion, the Court did not need to address directly the State Bar's "government speech" defense. *Id.* at 13. Notably, the Court arrived at its conclusion despite California's determination, as a matter of State law, that the State Bar was a "governmental agency." Indeed, the State Bar's status as an arm of the government was not open to serious dispute – after all, the plaintiffs could not have alleged that the State Bar violated the First Amendment and could not have invoked the jurisdiction of this Court in the absence of an allegation that the State Bar was acting under color of State law.

Keller's rationale for excepting "government speech" from the compelled speech doctrine strongly suggests that the government speech defense is inapplicable to this case. Reynolds and Lorillard do not contend that the First Amendment bars DHS from continuing with its vilification campaign; rather, they contend merely that DHS should not be permitted to continue the vilification campaign with money raised solely from the tobacco industry. Thus, this suit does not threaten DHS's ability to speak out at all. If this suit is successful, DHS could nonetheless continue its vilification campaign so long as it could persuade the legislature to appropriate sufficient funds to it from the California general treasury. In the absence of any threat to California's ability to speak out as it chooses on tobacco-related issues, there is no reason to abandon otherwise-applicable constitutional restraints on compelled speech simply because the recipient of the compelled funding is the government itself. Certainly, there is no basis for asserting that the odiousness of "compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves" is in any way reduced simply because the speaker is the government.

Indeed, there is a strong argument to be made that a law compelling private speakers to support and associate themselves with government speech should be subject to *stricter* constitutional scrutiny than one that compels them to support private speech. No value is more central to the First Amendment doctrine – one could fairly describe it as the reason we *have* the First Amendment – than the freedom of private speakers to *disassociate* themselves from the government. It most certainly protects against the government's ability to compel private citizens to provide affirmative support for the government's message – whether that support takes the firm of speaking a pledge (*Barnette*), displaying a State motto on a automobile license plate

(*Wooley*), signing an oath (*Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 447-49 (1974), or, as here, contributing money.

Far from suggesting that *Keller* is no longer good law, *Johanns* cites repeatedly to *Keller* in support of its understanding of the scope of the government speech defense. Accordingly, *Johanns* cannot be understood as granting governments unlimited authority, so long as funds pass through the government's hands at some stage of the process, to finance ideological speech using funds readily identifiable as having originated with individuals who object to the speech. What California is doing in this case is the First Amendment equivalent of the executioner who requires a condemned man to dig his own grave and to load the bullet before being shot. WLF respectfully suggests that many others besides Thomas Jefferson find such government conduct sinful and tyrannical,[5] and that *Johanns* should not be deemed to condone such conduct.

As noted above, *Keller*'s rejection of California's government speech defense (to a compelled speech challenge to State Bar spending) was not based on a finding that the State Bar was, in any sense, a private entity. Rather, *Keller* recognized that even though the State Bar was created and controlled by the State government, the government speech defense was inapplicable because of the special circumstances surrounding payments into the State Bar – in particular, the very small number of people paying funds into the State Bar meant that individual bar members could be readily identifiable as the funders of objected-to speech. Review is

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[5] Judge Trott, in his dissent, refers to the vilification program as "the ultimate cheap shot." Pet. App. 43a.

warranted in this case to determine whether (as the Ninth Circuit held) the government speech doctrine eliminates all First Amendment compelled speech concerns the moment funds pass into government hands; or whether (as Petitioners contend) there are limits on the scope of the government speech defense, and whether factors all present in this case such as the highly ideological nature of the speech, the ready identifiability of the funding as having come from the objectors, and the government's attribution of the speech to the objectors – are relevant in determining whether those limitations apply.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW HAS LED TO SHARP CONFLICTS WITHIN THE FEDERAL JUDICIARY

Johanns marked the first time that the Court invoked the government speech doctrine to reject a First Amendment challenge to compelled speech. As the divided decision below and other federal court decisions well illustrate, *Johanns* leaves unanswered many questions regarding the scope of the government speech doctrine. Review is warranted to resolve those questions, which have divided the lower federal courts.

As noted above, the Ninth Circuit panel hearing this case split 2-1, with Judge Trott disagreeing with the majority's determination that the government speech defense required dismissal of Petitioners' claims on the pleadings. Importantly, that split remained even after the parties filed supplemental briefs regarding the impact of *Johanns*.

The majority and dissent disagreed on virtually every relevant issue. The majority stated that "the *Johanns* opinion affirms our reasoning." Pet. App. 29a. Disagreeing with that

assessment, Judge Trott would have held: (1) the applicability of the government speech should not depend on the regulatory framework employed by the government in compelling speech, *id.* 36a; (2) the compelled funding scheme could not withstand constitutional scrutiny under the traditional "germaneness" test mandated by *Abood*, *id.* 42a; (3) there are few if any democratic checks on the vilification program, because only Petitioners and other participants in the tobacco industry – not taxpayers as a whole – must pay for the program, and therefore a First Amendment challenge is permissible, *id.* 43a; (4) Petitioners ought to have an opportunity to introduce evidence to demonstrate that the advertisements "coercively associate" them with the advertisements' anti-industry statements, *id.* 46a; and (5) *Johanns* is distinguishable because, unlike in *Johanns*, "the purpose of the compelled speech is deliberately destructive of those forced to pay for it." *Id.* 47a.

A federal district court in Alabama recently issued a decision that directly conflicts with the Ninth Circuit decision, and in the process criticized the district court decision upholding California's vilification program. *Summit Medical Center of Alabama, Inc. v. Riley*, 284 F. Supp. 2d 1350, 1361 (M.D. Ala. 2003). *Summit* involved a challenge to an Alabama statute that required abortion providers to purchase health information pamphlets from the State and distribute them to all patients seeking an abortion. Although the plaintiffs objected to being required to distribute the pamphlets, the court upheld that requirement on the ground that Alabama "has a significant interest in regulating the health and welfare of its citizens." *Id.* at 1362. However, the court struck down on First Amendment compelled speech grounds the provision that required abortion providers to pay the cost of producing the pamphlets to which they objected; the court held that to require such funding would too closely associate the plaintiffs with the speech to which they objected. *Id.* The

court explained, "'[W]here the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with the group, the government has directly focused its coercive power for expressive purposes.'" *Id.* at 1360 (quoting *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989)). The court criticized the district court in this case for reaching a contrary result; it said, "[T]his court departs from its analysis [*i.e.*, the analysis of the *Shewry* district court] because it failed to consider the importance that the government's assessment method has on the First Amendment analysis." *Id.* at 1361.

WLF ventures to guess that the decision below had much to do with the identity of the plaintiffs. Among industries that sell legal products, the cigarette industry is perhaps the least popular in this country. There is a natural tendency to overlook violations of constitutional rights when the victims do not easily elicit public sympathy. As the *Summit Medical* decision suggests, courts are far more likely to insist that constitutional rights be respected when those whose rights are being infringed are held in higher public esteem.

But the Bill of Rights does not exist solely for the benefit of the popular. To the contrary, it is those who are scorned by the public who are most likely to endure harsh treatment and who consequently are most in need of judicial protection of their constitutional rights. Review is warranted to ensure that Petitioners are afforded the same constitutional protections that federal courts have afforded to similarly situated individuals facing similar compulsions to fund speech that they find abhorrent.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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